INDEX

	Page
Relevant docket entries	1
Petition for review	3
Certificate of transcript of record	5
Record on appeal	7
Motion of respondent to dismiss petition	44
Order of Oct. 13, 1969, denying motion to dismiss petition	45
Affidavit of Matthew E. Jaffe, Dec. 18, 1969	46
Opinion of July 8, 1970	47
Judgment	80
Order of Aug. 26, 1970, denying petition for rehearing and suggestion of rehearing en banc	82
Order of Mar. 22, 1971, granting petition for a writ of certiorari	82

423-090—71——1

RELEVANT DOCKET ENTRIES

Date	
1969	
June 29	Petition for review of an order of the Securities and Exchange Commission
July 10	Transcript of record
July 10	Motion of respondent to dismiss petition for review
July 22	Petitioner's memorandum in opposition to respondent's motion to dismiss
August 4	Respondent's reply to petitioner's memorandum in opposition to respondent's motion to dismiss
August 15	Petitioner's motion for leave to file supplemental memorandum in opposition to respondent's motion to dismiss
August 25	Respondent's response to motion for leave to file supplementary memorandum in opposition to motion to dismiss
August 27	Clerk's order granting petitioner's motion for leave to file supplemental memorandum in opposition to respondent's motion to dismiss
August 27	Petitioner's supplementary memorandum in opposition to motion to dismiss
August 27	Reply of Securities & Exchange Commission to supplementary memorandum in opposition to motion to dismiss (Filed per Fiat of Judge Wright)
October 13	Per Curiam order denying respondent's motion to dismiss the petition for review without prejudice to renewal thereof in the briefs and at the argument on the merits McGowan, Tamm and Leventhal, CJ. Circuit Judge Tamm would grant respondent's motion to dismiss
November 12	Petitioner's brief
December 26	Respondent's brief
1970	
January 15	Petitioner's reply brief
January 26	Respondent's motion for leave to file a supplementary memorandum in response to the reply brief filed by petitioner
February 2	Petitioner's memorandum in response to motion for leave to file a supplementary memorandum
February 2	Petitioner's motion for leave to file attached response to supplementary memorandum of SEC
March 6	Order per Judge Robinson directing the Clerk to file respondent's lodged supplemental memorandum in response to petitioner's reply brief and petitioner's reply thereto; and denying petitioner's motion that the case be submitted for decision on the briefs without argument

Date 1970	
March 6	Respondent's supplemental memorandum in response to reply brief
March 6	Petitioner's reply to supplemental memorandum in response to reply brief
July 8	Opinion per Circuit Judge Tamm
July 8	Judgment remanding case to the Securities and Exchange Commission for further proceedings consistent with opinion
July 8	Order, sua sponte, amending opinion. Tamm, CJ
July 21	Respondent's motion to extend time to file a petition for rehearing and a suggestion for rehearing en banc to August 10
July 29	Order per Wright, ACJ extending time to file petition for rehearing and/or suggestion for rehearing *en banc* to August 10th
August 10	Respondent's petition for rehearing and suggestion for rehearing en banc
August 26	Per Curiam order denying respondent's petition for rehearing. McGowan, Tamm, Robinson, C.J.
March 29	Certified copy of Order of Supreme Court granting Certiorari on March 22, 1971

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1968

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

NOTIFICATION OF THE FILING OF A PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

GENERAL COUNSEL
Securities and Exchange Commission
Washington, D.C.

GENTLEMEN: You are hereby notified that the attached is a true copy of the Petition for Review of an Order of the Securities and Exchange Commission filed in the said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C., on May 29, 1969, in the above-entitled case.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the District of Columbia Circuit, at Washington, D.C., this 2nd day of June, 1969.

NATHAN J. PAULSON,
Clerk of the United States Court of Appeals
for the District of Columbia Circuit.
By: MARIA L. HARRISON,
Deputy Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER,

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia Circuit:

Petitioner, The Medical Committee for Human Rights, a shareholder of record of Dow Chemical Company, a Delaware corporation, hereby petitions this Court for review of an Order of the Securities & Exchange Commission, issued on April 2, 1969, (S.E.C. File No. 1–3433) in which the Commission held that Dow's management had the right, as a matter of law, to omit from management's proxy solicitation materials two proposals submitted by petitioner for Dow's 1969 annual meeting.

ROBERTS B. OWEN,
888 Sixteenth Street, N.W.,
Washington, D.C. 20006,
Attorney for the Medical Committee for Human Rights.

May 29, 1969.

CERTIFICATE OF SERVICE PURSUANT TO RULE 25(d), FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify that I have mailed on this 29th day of May, 1969, by first-class mail postage prepaid, to Mr. W. A. Groening, Jr., General Counsel, The Dow Chemical Company, 2030 Abbott Road Center, Midland, Michigan 48640, a copy of a Petition for Review of an order of the Securities and Exchange

Commission issued April 2, 1969, (SEC File No. 1-3433), filed today in the U.S. Court of Appeals for the District of Columbia Circuit by the Medical Committee for Human Rights.

ROBERTS B. OWEN,
Attorney for Medical Committee for Human Rights.

United States Court of Appeals for the District of Columbia Circuit

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No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

CERTIFICATE OF TRANSCRIPT OF RECORD*

The Securities and Exchange Commission certifies the following documents, numbered 1 through 25, inclusive, a copy of each of which is attached, as a transcript of the record* in this case—being a copy of each of the letters between representatives of the Medical Committee for Human Rights, The Dow Chemical Company and the Commission that are contained in the Commission's files that pertain to the matters alluded to in the petition for review:

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*The Commission, concurrently with the filing of this certificate, has moved this Court to dismiss the petition for review for lack of jurisdiction and has filed a memorandum in support of that motion to which the documents enumerated herein are appended. For the reasons stated in that memorandum, the Commission does not believe that there exists for certification a transcript of any "record" upon which an "order" or other reviewable action has been entered within the meaning of any relevant statute or of Rules 16 and 17 of the Federal Rules of Appellate Procedure. Without prejudice to the Commission's position, as noted in the memorandum, this certificate is filed in accordance with the procedural precedent established in the case of *Leighton* v. *Securities and Exchange Commission*, 95 App. D.C. 217, 221 F. 2d 91, *certiorari denied*, 350 U.S. 825 (1955).

Document No.	Description	Pages
1.	Letter, dated March 11, 1968, from Quentin D. Young, M.D., National Chairman, Medical Committee for Human Rights, to Secretary, Dow Chemical Company	1a–3a
2.	Letter, dated March 21, 1968, from W. A. Groening, Jr., General Counsel, The Dow Chemical Company, to Dr. Young	4a
3.	Letter, dated March 26, 1968, from Dr. Young to Mr. Groening	5a–6a
4.	Letter, dated January 6, 1969, from Dr. Young to Mr. Groening	7a–8a
5.	Letter, dated January 17, 1969, from Mr. Groening to Herbert H. Dow, Secretary, The Dow Chemical Company	9a–10a
6.	Letter, dated January 17, 1969, from Mr. Dow to Dr. Young	11a
7.	Letter, dated January 17, 1969, from Mr. Dow to Securities and Exchange Commission	12a
8.	Letter, dated January 24, 1969, from Mr. Groening to M. E. Jaffe, Securities and Exchange Commission	13a
9.	Letter, dated February 3, 1969, from Dr. Young to Mr. Groening	14a
10.	Letter, dated February 3, 1969, from Dr. Young to Mr. Groening	15a–16a
11.	Letter, dated February 3, 1969, from Dr. Young to the Commission, attention Donald Lewis	17a
12.	Letter, dated February 7, 1969, from Mr. Dow to the Commission	18a
13.	Letter, dated February 7, 1969, from Mr. Groening to Mr. Dow	19a
14.	Letter, dated February 18, 1969, from Courtney Whitney, Chief Counsel, Division of Corporation Finance to Mr. Dow	20a
15.	Letter, dated February 18, 1969, from Mr. Whitney to Dr. Young	21a
16.	Letter, dated February 28, 1969, from Mr. Groening to the Commission	22a–23a
17.	Letter, dated February 28, 1969, from Messrs. Arnold & Porter, to the Commission, attention Mr. Whitney	24a
18.	Letter, dated February 28, 1969, from Messrs. Arnold & Porter, to the Commission, attention Mr. Lewis	25a
19.	Letter, dated February 28, 1969, from Messrs. Arnold & Porter to the Commission	26a–33a
20.	Letter, dated March 7, 1969, from R. W. Barker, Assistant General Counsel, The Dow Chemical Company, to the Commission, attention Mr. Jaffe	34a–35a
21.	Letter, dated March 14, 1969, from William E. Toomey, Assistant Chief Counsel, Division of Corporation Finance, to Jeffrey Bauman, Esq., Messrs. Arnold & Porter	36a
22.	Letter, dated March 17, 1969, from Messrs. Arnold & Porter to the Commission, attention Mr. Whitney	37a
23.	Letter, dated March 17, 1969, from Messrs. Arnold & Porter to the Commission	38a–43a
24.	Letter, dated April 2, 1969, from Mr. Whitney to Mr. Bauman	44a
25.	Letter, dated April 2, 1969, from Mr. Whitney to Mr. Groening	45a

The Commission also certifies that document number 26, a copy of which is attached, page 46a, is a true copy of a minute of Commission action as it appears in the official Minute Record of Commission Actions, and that document number 26 as shown in that Minute Record reflects the only action taken by the Commission prior to the filing of the petition for review herein with respect to the matters alluded to in the petition.

For the Commission (pursuant to delegated authority):

ORVAL L. DUBOIS,
Secretary.

Washington, D.C.
July 10, 1969

[1a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS

MARCH 11, 1968.

SECRETARY, DOW CHEMICAL COMPANY,
General Office Building,
2030 Abbott Road Center,
Midland, Michigan 48640

DEAR SIR: The Medical Committee for Human Rights, through a generous gift, has become owner of shares in Dow Chemical Company. While we are pleased to be beneficiaries of such support, it has been called to our attention that at least one of the products manufactured by our company raises moral and ethical questions pertinent to the goals of the Medical Committee for Human Rights.

I refer, of course, to the production of napalm. After consultation with the executive body of the Medical Committee, I have been instructed to request an amendment to the charter of our company, Dow Chemical. We have learned that we are technically late in asking for an amendment at this date, but we wish to observe that it is a matter of such great urgency that we think it is imperative not to delay until the shareholders' meeting next year. We respectfully request that this proposal be included in the proxy statement which will be sent to the shareholders informing them of the matters to be considered at the meeting of May 8, 1968.

We hope you will be able to comply with this request, though late, because delay could result in the horrible death and suffering of thousands of civilians inflicted by our product, par-

ticularly in Vietnam, but not only there. Should you be unable to consider this request for technical reasons, we might have to turn to other shareholders to obtain a special shareholders' meeting to consider the proposal. This unnecessary expense could be avoided if our proposed amendment is simply [2a] included at this time for this year's annual meeting.

We respectfully propose the following wording to be sent to the shareholders:

> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

Further, while we do not wish to propose the precise wording that the proposed amendment by the Board of Directors should take, for the benefit of the Board, we suggest it might be helpful to have the following proposed amendment to the Composite Certificate of Incorporation for their assistance and guidance:

> "RESOLVED, that Article III of the Composite Certificate of Incorporation of the Dow Chemical Company be and is hereby amended to include Clause (K) which provides as follows: '(K) But none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings.' "

Finally, we wish to note that our objections to the sale of this product is primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for our company's business as it is being used in the Vietnamese War. It is now clear from company statements and press reports that it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth. There is, as well, an adverse impact on our

global business, which our advisers indicate, suffers as a result of the public reaction to this product.

[3a] I trust that the amendments will be handled expeditiously. In any event, we request the amendments be prepared for 1969 consideration if the Board feels it cannot handle the issue in 1968.

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
National Chairman,
Medical Committee for
Human Rights.

CC: President, Dow Chemical Company
General Counsel, Dow Chemical Company
Chairman, Securities and Exchange Commission

[4a]

THE DOW CHEMICAL COMPANY
General Office Building,
2030 Abbott Road Center,
Midland, Michigan 48640,
March 21, 1968.

QUENTIN D. YOUNG, M.D.,
National Chairman, Medical Committee for Human Rights,
1512 East 55th Street, Chicago, Illinois 60615.

DEAR DR. YOUNG: This will reply to your letter of March 11 in which you propose an amendment to our Certificate of Incorporation to insert limitations on the sale of napalm.

Your letter has arrived too late for the proposal to be considered in connection with the annual meeting of May 8, 1968, as the proxy statement has already been printed and it must be mailed forthwith to security holders so that they may have ample notice of the meeting in time to return their proxies.

With regard to your request that the proposal be considered for the 1969 annual meeting, we will study the matter and will communicate with you later this year.

Sincerely yours,

W. A. GROENING, Jr., *General Counsel.*

cc: H. D. Doan, President
H. H. Dow, Secretary
Securities and Exchange Commission
Att'n: Mr. Donald Lewis, Branch Chief

[5a]

MARCH 26, 1968.

Mr. W. A. GROENING, Jr.,
General Counsel, The Dow Chemical Company, 2030 Abbott Road Center, Midland, Michigan 48640.

DEAR MR. GROENING: I have received your reply to my letter of March 11th. I am, of course, very disappointed that my proposed amendment was not prepared for the proxy statement which will be mailed forthwith to securities holders. As I stated on March 11th, the matter in question is of extraordinary importance. A year's delay in changing our charter will almost certainly result in our product burning thousands of civilians, many of them to death. But, as I also emphasized in my communication, it is obvious that the company is suffering in two practical ways additionally: We are not attracting the top college graduates because of their shared concern over the use of our product; and, sales at home and abroad are doubtless adversely affected by the bad reputation the use of our product has engendered.

Therefore, I believe I can urge that you promptly mail the brief proposed amendment to all security holders. Assembling a special meeting for this purpose would be costly.

[6a] Please send me a list of security holders in our company.

Sincerely,

QUENTIN D. YOUNG, M.D.,
National Chairman,
Medical Committee for Human Rights.

cc: H. D. Doan, President
H. H. Dow, Secretary
Securities and Exchange Commission
Att'n: Mr. Donald Lewis, Branch Chief

[7a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,
1512 East 55th Street,
Chicago, Illinois 60615,
January 6, 1969.

Mr. W. A. GROENING, Jr.,
General Counsel, Dow Chemical Company, 2030 Abbott Road Center, Midland, Michigan 48640.

DEAR MR. GROENING: On March 21, 1968 you informed me that a proposed amendment to our Certificate of Incorporation

to insert limitations on the sale of napalm in connection with the annual meeting on May 8, 1968, was submitted too late to be included in the proxy statement, which was being mailed forthwith to security holders. You closed your letter: "With regard to your request that the proposal be considered for the 1969 annual meeting, we will study the matter and will communicate with you later this year." I am, of course, distressed that 1968 has passed without our having received a single word from you on this important matter.

Be that as it may, I would at this time once again respectfully request that our proposal be included in the proxy statement which will be sent to shareholders informing them of matters to be considered at the 1969 meeting. In addition to the cogent reasons enumerated last year, we find even more compelling feature of peace negotiations, which may well make termination of the use of our products against humans a reality, at least in Vietnam. This fact constitutes an opportunity which can go far toward restoring the image of our Company.

By submitting this amendment sufficiently in advance of the mailing to shareholders, we trust there can now be no obstacle to permitting the shareholders to express themselves.

For your convenience, I am stating once again the proposal you were unable to send out last year:

[8a] "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

Further, while we do not wish to propose the precise working that the proposed amendment by the Board of Directors should take, for the benefit of the Board, we suggest it might be helpful to have the following proposed amendment to the Composite Certificate of Incorporation for their assistance and guidance:

"RESOLVED, that Article III of the Composite Certificate of Incorporation of the Dow Chemical Com-

pany be and is hereby amended to include Clause (K) which provides as follows: '(K) but none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings.'"

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

CC: Mr. H. D. Doan, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Securities and Exchange Commission, Attention: Mr. Donald Lewis, Branch Chief
T. G. G. Wilson, M.D., Ph. D., National Chairman, Medical Committee for Human Rights

[9a]

WILLIAM A. GROENING, Jr.
Attorney and Counsellor at Law,
Midland, Michigan,
January 17, 1969.

Mr. HERBERT H. DOW,
Secretary,
The Dow Chemical Company,
Midland, Michigan 48640.

DEAR MR. DOW: You have received from Dr. Quentin D. Young, Member of the Executive Committee of the Medical Committee for Human Rights, a copy of his letter to me dated January 6, 1969, setting forth a proposal that Article III of the Composite Certificate of Incorporation of The Dow Chemical Company be amended by the addition of a clause (k) to read as follows:

> "but none of the following clauses shall be taken to authorize the sale of napalm to any buyer unless the buyer gives reasonable assurance that the substance will not be used on or against human beings."

I have reviewed the proposal of the Medical Committee for Human Rights in the light of Regulation 14A of the Securities and Exchange Commission and especially Rule 14a–8(c) which sets forth five circumstances under which the management

may omit a proposal and any statement in support thereof from its proxy statement and form of proxy.

Rule 14a–8(c)(5) permits such omission.

> "If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

It is my opinion that the determination of the products which the Company shall manufacture, the customers to which it shall sell the products, and the conditions under which it shall make such sales are related to the conduct of the ordinary business operations of the Company and that any attempt to amend the Certificate of Incorporation to define the circumstances under which the management of the Comapny shall make such determinations is contrary to the concept of corporate management, which is inherent in the Delaware General Corporation Act under which the Company is organized. Moreover, [10a] there is a considerable doubt as to the efficacy of the proposed limitation in the context of the ability of the Government of the United States to issue a directive that the Company manufacure napalm. Therefore, the proposed limitation could conceivably be contrary to the requirements of the Defense Production Act of 1950.

Rule 14a–8(c)(2) provides for omission of a proposal

> "If it clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

It is a well-known fact that the Company has been the target of protests and demonstrations for the past few years at its office and plant locations, and on the occasion of recruiting on college and university campuses, as well as at its annual meeting of stockholders held May 8, 1968. The various protests and demonstrations are a reflection of opposition on the part of certain segments of the population against the policy of the United States Government in waging the war in Viet Nam. Although The Dow Chemical Company was not among the 100 largest prime contractors with the Department of Defense during the 1967–68 Government fiscal year and was only 75th on the list

in the 1966–67 fiscal year, it appears to have been singled out symbolically by the protesters. Under all of these circumstances it is my opinion that it clearly appears that the proposal is primarily for the purpose of promoting a general political, social or similar cause.

In conclusion, it is my opinion that under Rules 14a–8(c) (2) and (5) the Company may omit the proposal of the Medical Committee for Human Rights from its proxy statement for the annual meeting of stockholders to be held May 7, 1969.

Sincerely yours,

W. A. GROENING, Jr.

[11a]

THE DOW CHEMICAL COMPANY,
Midland, Michigan 48640,
January 17, 1969.

Dr. QUENTIN D. YOUNG,
Member, Executive Committee, Medical Committee for Human Rights, 1512 East 55th Street, Chicago, Illinois 60615.

DEAR DR. YOUNG: This will reply to your letter of January 6 addressed to Mr. W. A. Groening, Jr.

We intend to omit your proposal from our proxy statement and form of proxy for our annual meeting of stockholders to be held May 7, 1969. Enclosed is a copy of our letter to the Securities and Exchange Commission setting forth the statement of reasons why we deem the omission of the proposal to be proper. In support of same we also enclose a copy of Mr. Groening's opinion as General Counsel of the Company.

Sincerely yours,

HERBERT H. DOW, *Secretary.*

Enclosures
cc: H. D. Doan

[12a]

THE DOW CHEMICAL COMPANY,
Midland, Michigan 48640,
January 17, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Avenue,
Washington, D.C. 20549.

Re: *File No. 1–3433*

GENTLEMEN: I enclose herewith a proposal of the Medical Committee for Human Rights pertaining to a question to be

submitted at our 1969 annual meeting. Also enclosed is the opinion of Mr. W. A. Groening, Jr., General Counsel of our Company, concerning the status of the proposal under Rule 14a–8(c) of the Securities and Exchange Commission.

For the reasons set forth in Rule 14a–8(c) (2) and (5), The Dow Chemical Company intends to omit the proposal from its proxy statement and form of proxy for its annual meeting of stockholders to be held May 7, 1969.

A copy of this letter and of Mr. Groening's opinion is being forwarded to the Medical Committee for Human Rights.

Sincerely yours,

HERBERT H. DOW, *Secretary.*

Enclosures

cc: Medical Committee for Human Rights
1512 E. 55th St.
Chicago, Ill. 60615

[13a]

THE DOW CHEMICAL COMPANY,
General Office Building,
2030 Abbott Road Center,
Midland, Michigan 48640,
January 24, 1969.

Mr. M. E. JAFFE,
Securities and Exchange Commission,
500 North Capitol Avenue,
Washington, D.C. 20549.
Re: *File No. 1–3433*

DEAR MR. JAFFE: Pursuant to our telephone conversation of this morning I am enclosing a copy of the proposal of the Medical Committee for Human Rights which was inadvertently omitted from enclosure with our letter of January 17 to the Commission.

You will note that the proposer sent a copy of his letter to the attention of Mr. Donald Lewis.

Sincerely yours,

W. A. GROENING, Jr., *General Counsel.*

Enclosure

[11a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,
1512 East 55th Street,
Chicago, Illinois 60615,
February 3, 1969.

Mr. W. A. GROENING, JR.,
General Counsel,
Dow Chemical Company,
2030 Abbott Road Center,
Midland, Michigan 48640.

DEAR MR. GROENING: Enclosed is a new request by the Medical Committee for Human Rights for a proposal to be included by the management of our company's proxy statement, along with a copy of a letter which we have sent to the Securities and Exchange Commission.

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

[15a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,

1512 East 55th Street,
Chicago, Illinois 60615,
February 3, 1969.

Mr. W. A. GROENING, JR.,
General Counsel,
Dow Chemical Company,
2030 Abbott Road Center,
Midland, Michigan 48640.

DEAR MR. GROENING: On behalf of the Medical Committee for Human Rights, I would like to thank you for your gracious consideration of the Committee's proposed resolution to be submitted to our company's shareholders.

We were disappointed to discover that in your legal memoranda for Mr. Dow you misconstrued the nature of our request. In order to make the purpose of our proposal very clear, and to meet certain of the objections to our proposal which were implied by your memo, we are submitting our proposal in a somewhat revised form with the expectation that the manage-

ment will agree to include our proposed resolution in the proxy statement to be sent to stockholders for the annual meeting to be held on May 7, 1969.

Your memo to Mr. Dow is devoted to a consideration of the "proposal that Article III of the Composite Certificate of Incorporation of the Dow Company be amended by the addition of a Clause 'K'," which you then quote. We have made no such proposal to Dow, nor would we presume to serve as draftsmen for an amendment to the corporate charter. As we said in our letter of March 11, 1968, and repeated in our letter of January 6, 1969, "we do not wish to propose the precise wording that the proposed amendment by the Board of Directors should take." For the Board's benefit we did offer some language which it could use or reject, as it saw fit, in considering our proposal. But I must inform you that we were somewhat disappointed that your memo to Mr. Dow dwelt on a proposal which we did not make and failed even to discuss the proposal which we said that we would like to have included in the proxy statement.

[16a] Quite simply, we proposed that the shareholders of Dow request the company's Directors to consider the advisability of adopting an amendment, to the purposes' section of the corporate charter. We are convinced that our company's sale of napalm has damaged the company financially, and that it is outside of the scope of business in which the company's owners would like Dow to be engaged. We are willing to bend, however, to your belief that the management should be allowed to decide to whom and under what conditions it will sell its products. Nevertheless, we are certain that you would agree that the company's owners have not only the legal power but also the historic and economic obligation to determine what products their company will manufacture. Therefore, with the hope that you will find our revised proposal suitable for submission to the stockholders, requesting the Directors to consider the advisability of adopting an amendment to the corporate charter forbidding the company to make napalm (any such amendment would, of course, be subject to the requirements of the "Defense Production Act of 1950," as are the corporate charters and management decisions of all United States Corporations), we request that the following resolution be included in this year's proxy statement:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors,

in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

CC: Mr. H. D. Dow, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Securities and Exchange Commission, Attn: Mr. Donald Lewis
T.G.G. Wilson, M.D., Ph. D., National Chairman, Medical Committee for Human Rights

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[17a]

MEDICAL COMMITTEE FOR HUMAN RIGHTS,
1512 East 55th Street,
Chicago, Illinois 60615,
February 3, 1969.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

Attention: Mr. Donald Lewis

DEAR MR. LEWIS: Enclosed is a copy of a request for a resolution to be included by the Dow Chemical Company in its proxy statement for the annual meeting of stockholders to be held on May 7, 1969, pursuant to Rule 14A–8. We hope that the management will agree to include this proposal in its proxy statement.

Should Dow decide to omit the proposal, however, we request a staff review of Dow's decision. If the staff agrees with Dow's decision to omit the proposal, we request an oral argument before the Commission itself.

Sincerely yours,

QUENTIN D. YOUNG, M.D.,
Member, Executive Committee,
Medical Committee for Human Rights.

Encl.

[18a]

THE DOW CHEMICAL COMPANY
Midland, Michigan 48640,
February 7, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Avenue,
Washington, D.C. 20549.

Re: *File No. 1–3433*

GENTLEMEN: I enclose copies of three letters from the Medical Committee for Human Rights, two of them being addressed to our General Counsel, Mr. W. A. Groening, Jr. and the third being a copy of a letter addressed to Mr. Donald Lewis of the Securities and Exchange Commission. Also enclosed is the opinion of Mr. Groening commenting on the same.

For the reasons set forth in Rules 14a–8(a) and 14a–8(c) (2) and (5) we intend to omit the proposal from our proxy statement and form of proxy for our annual meeting of stockholders to be held May 7, 1969.

A copy of this letter and of Mr. Groening's opinion is being forwarded to the Medical Committee for Human Rights.

Sincerely yours,

HERBERT H. DOW, *Secretary.*

Enclosures
cc: Herbert D. Doan
Medical Committee for Human Rights,
1512 E. 55th St.,
Chicago, Ill. 60615.

[19a]

WILLIAM A. GROENING, Jr.,
Attorney and Counsellor at Law,
Midland, Michigan,
February 7, 1969.

Mr. HERBERT H. DOW,
Secretary,
The Dow Chemical Company,
Midland, Michigan 48640.

DEAR MR. DOW: You have received a copy of the letter from the Medical Committee for Human Rights signed by Dr. Quentin D. Young dated February 3, 1969, and addressed to

me in which he sets forth the following resolution to be included in the proxy statement for the Company's 1969 annual meeting:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

Dr. Young's letter states that I have misconstrued the nature of the request set forth in his letter of January 6 and he offers new wording because of that. My opinion to you of January 17 was not concerned with the form or wording of the proposal but was concerned with the substance of the matter involved. The new proposal, if in fact it is a new proposal, is subject to the same substantive comments as were set forth in my letter of January 17 and I, therefore, reaffirm my opinion of that date that under Rules 14a–8(c) (2) and (5) the proposal, whether in the form set forth in Dr. Young's letter of January 6 or in the form set forth in his letter of February 3, is one that the Company may omit from its proxy statement for the forthcoming annual meeting of stockholders.

If, in fact, the proposal set forth in the letter of February 3 is a new proposal rather than a restatement of the first proposal, it is one which under Rule 14a–8(a) may be omitted because it has not been submitted at least 60 days in advance of a day corresponding to the first date on which our proxy soliciting material was released to security holders in connection with last year's annual meeting. That date last year was March 25, 1968.

Sincerely yours,

W. A. GROENING, Jr.

[20a]

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C. 20549, February 18, 1969.

Mr. HERBERT H. DOW,
Secretary, The Dow Chemical Company, Midland, Michigan 48640

Re: File No. 1–3433

DEAR MR. DOW: This is with respect to the proposal submitted by Dr. Quentin D. Young in a letter to your company dated

January 6, 1969, concerning an amendment to the Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings for inclusion in the proxy material for the 1969 annual meeting of shareholders.

For reasons stated in your letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action to the Commission if this proposal is omitted from the management's proxy material for the Company's annual meeting pursuant to Rules 14a–8(c)(2) and 14a–8(c)(5) under the Securities Exchange Act of 1934.

Sincerely yours,

COURTNEY WHITNEY,
Chief Counsel, Division of Corporation Finance.

cc: Dr. Quentin D. Young,
Member, Executive Committee, Medical Committee for Human Rights, 1512 East 55th Street, Chicago, Illinois 60615

[21a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, February 18, 1969.

File No. 1–3433

Dr. QUENTIN D. YOUNG,
Member, Executive Committee, Medical Committee for Human Rights, 1512 East 55th Street, Chicago, Illinois 60615

Re: The Dow Chemical Company

DEAR DR. YOUNG: This is with regard to the proposal concerning an amendment to the Composite Certificate of Incorporation of The Dow Chemical Company to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings which you submitted in your letter to Dow Chemical Company dated January 6, 1969. Enclosed is a copy of our letter to the Company, indicating that this Division will not recommend any action to the Commission if your proposal is omitted from the Company's proxy soliciting material.

Sincerely yours,

COURTNEY WHITNEY,
Chief Counsel, Division of Corporation Finance.

Enclosure:
Carbon copy of letter

[22a]

THE DOW CHEMICAL COMPANY,
General Office Building, 2030 Abbott Road Center,
Midland, Michigan 48640, February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol, Washington, D.C. 20549
Re: *File No. 1–3433*

GENTLEMEN: Pursuant to Rule X–14A–6 under the Securities Exchange Act of 1934, we submit herewith five preliminary copies each of the proposed proxy statement and form of proxy, plus one copy of the proxy statement marked to show changes, pertaining to the annual meeting of stockholders of The Dow Chemical Company schedule for Wednesday, May 10, 1969.

Present plans are to commence mailing this material to the holders of Common Stock on March 20, 1969.

Your attention is directed to the fact that the number of shares to be outstanding at the close of business March 10, 1969, is unknown at the present time because of the possibilities of debenture conversions and exercise of employee options. This figure will, of course, be filled in prior to final printing. For your information, the number of shares outstanding and entitled to vote at the close of business January 31, 1969, was 30,234,537, excluding the 1,000,000 issued shares held by the Company as treasury stock.

Proxies were submitted with respect to the prior year's annual meeting in accordance with the Securities and Exchange Commission's proxy rules. Copies of all proxy solicitation material were filed with you over my signature under date of March 22, 1968.

The proposed proxy statement differs from last year's proxy statement in the following particulars:

1. There is one change in the Board of Directors. The retirement of Earl W. Bennett from the Board is discussed and G. J. Williams, recently appointed to the Board, is presented as a new nominee.

[23a] 2. Under the caption "Remuneration and Retirement Benefits, and Transactions with Officers and Directors", information concerning dividend units and options has been removed but has been included in the description of Proposal No. 3 under the caption "The Dow Chemical Company Award Plan".

3. Proposals No's. 1, 2 and 3 have been added to this year's proxy statement as have Exhibits A, B and C, all of which relate to the same. Because of the presentation of these proposals the form of proxy differs from last year, affording the stockholders the opportunity to vote separately upon each proposal and to vote separately for or against the election of directors.

4. Under the caption "Other Matters" reference is made to a proposal of a stockholder which the Company has omitted pursuant to its letter to the Commission dated January 17, 1969, to which the Chief Counsel of the Division of Corporation Finance responded under date of February 18, 1969.

If any representative of the Commission wishes to discuss any of the matters pertaining to the proxy statement and form of proxy, I shall be glad to accept a collect telephone call. My number is Area Code 517, 636–1957. If I should be absent, Mr. R. W. Barker, Assistant General Counsel, could take the call in my place.

Sincerely yours,

W. A. GROENING, Jr., *General Counsel.*

Enclosures

[24a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W., Washington, D.C. 20036,
February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549
(Attention: Courtney Whitney, Jr., Esq., Chief Counsel, Division of Corporation Finance)

GENTLEMEN: Enclosed is a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER
By JEFFREY D. BAUMAN.

Enclosure

[25a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W.,
Washington, D.C. 20036, February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549
(Attention: Mr. Donald L. Lewis, Branch Chief, Division of Corporation Finance)

GENTLEMEN: Enclosed are 20 copies of a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER
By JEFFREY D. BAUMAN.

Enclosures

[26a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W.,
Washington, D.C. 20036, February 28, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549

GENTLEMEN: We are counsel for the Medical Committee for Human Rights ("Medical Committee") in connection with a proposed resolution to be included in the proxy statement of the Dow Chemical Company ("Dow") in connection with the annual meeting of stockholders to be held on May 7, 1969. On

February 18, 1969, the Division of Corporation Finance advised the Medical Committee that Dow could omit the proposal from its proxy soliciting material. We believe that this decision was erroneous, and that the proposal is a proper one for shareholder action under Rule 14a–8 of the Commission's Proxy Rules. Accordingly, we request that the Commission review the decision of the Division of Corporation Finance and take the necessary steps to compel Dow to include the proposal in its forthcoming proxy soliciting material.

I. The Resolution

The Medical Committee's proposal would require the inclusion of the following resolution:

> "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the state of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment **[27a]** to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

To meet some of Dow's objections to the above-quoted resolution, as set forth in Dow's letter of January 17, 1969 to the Medical Committee (see Section II, *infra*), the Medical Committee proposed an alternative resolution in a letter to Dow dated February 7, 1969. Dow has indicated that this latter resolution was not timely received. We believe that the arguments set forth in the body of this letter apply equally to the original resolution and to the alternative proposed by the Medical Committee, and we include the text of this alternative resolution below, should the Commission prefer to compel its inclusion rather than the inclusion of the original resolution.

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that the company shall not make napalm."

II. Background

On March 11, 1968, the Medical Committee, which owned five shares of the common stock of Dow, sent a letter to Dow requesting the inclusion of the first resolution quoted above in the proxy statement for the annual meeting of stockholders to be held on May 8, 1968. On March 21, 1968, Dow advised the Medical Committee that its letter had arrived too late for the proposal to be included in the proxy statement for that meeting, and it advised the Medical Committee that the request would be considered again in connection with the 1969 annual meeting. On January 6, 1969, having received no further communications [28a] from Dow on this matter, the Medical Committee renewed its request to Dow that the resolution be included in the proxy statement for the 1969 annual meeting. On January 17, 1969, counsel for Dow advised the Medical Committee that it would omit the proposed resolution from its proxy statement, seemingly in reliance on Rules 14a–8(c)(2) and (5) of the Commission's Proxy Rules. On February 3, 1969, the Medical Committee wrote to Dow, replying to its comments on the first resolution and proposing the second resolution as an alternative. On February 18, 1969, as we have pointed out, the Division of Corporation Finance advised Dow and the Medical Committee that the first resolution could be omitted.

III. Rule 14a–8(c)(5)

Rule 14a–8(c)(5) permits management to omit a shareholder proposal

> "if the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer."

We contend that the Medical Committee's resolution cannot be excluded under the above-quoted paragraph. The resolution does not relate to the conduct of the ordinary business operations of the issuer. Rather, its subject matter is an amendment of the Certificate of Incorporation, a subject which, under Delaware law, can never be "a matter relating to the ordinary business operations of the issuer." Indeed, Delaware law specifically requires shareholder action before a corporation can

amend its Certificate of Incorporation. Section 242(d)(1) of the Delaware Corporation Law provides:

> "Every amendment * * * shall be made and effected in the following manner—
>
> [The corporation's] directors shall adopt a resolution setting forth the amendment **[29a]** proposed declaring its advisability, and either calling a special meeting of the stockholders * * * or directing that the amendment proposed be considered at the next annual meeting of the stockholders."

As the Commission is aware, on occasion, the Division of Corporation Finance has accepted the Medical Committee's argument on this point, albeit with respect to the amendment of bylaws rather than the Certification of Incorporation. As the Division stated in a letter of January 19, 1961,

> "We are not prepared to conclude that a matter which the courts have held to be a proper subject for a shareholder's proposal to amend the bylaws is a matter relating to the conduct of the ordinary business operations of the issuer within the meaning of 14a–8(c)(5)."

Dow itself impliedly concedes that Delaware law permits a shareholder to initiate a proposal to amend the Certificate of Incorporation, since it does not contend that the proposal could be omitted under Rule 14a–8(c)(1) as not being a proper subject for action by security holders under state law.

IV. Rule 14a–8(c)(2)

Rule 14a–8(c)(2) permits management to omit a shareholder proposal

> "if it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

[30a] In order to rely on this provision as a ground for excluding a shareholder proposal, management must demonstrate that the *primary* purpose of the proposal is to promote a "general * * * political cause"; it is not sufficient to demonstrate that *one* of the purposes of the resolution is political. It is our contention that the primary purpose of the Medical Com-

mittee's resolution is to assist Dow to improve the operations of its business. We believe that the adoption of the proposal will ultimately permit Dow to improve its admittedly troubled recruiting procedures, and to improve its public image. Dow itself recognizes that its ability to attract and retain "sensitive and creative employees" has been severely restricted by its continued manufacture of napalm, notwithstanding that napalm does not contribute materially to the income of Dow. See the article of February 10, 1969 from the New York Times attached to this letter.

It is clear from the history of Rule 14a–8(c)(2) that it was intended principally to prevent proxy statements from being used as a forum for referenda by stockholders on general political questions which bore no relationship to the business of the company. See Securities Exchange Act Release No. 3638, January 3, 1945. Indeed, the word "general" in the Rule must be read as modifying all the specific types of causes enumerated thereafter, *i.e.*, general political causes. The Rule was not intended to prevent shareholders from having a voice in the policy of a company in areas which are properly the concern of shareholders but which also happen to be of a political or social nature.

The Medical Committee admits that its proposal has a political aspect but it submits that the primary purpose of the proposal is not to promote a general political cause. We believe that to permit Dow to exclude the proposal would be contrary to the Commission's own Proxy Rules and to public policy. As former Chairman Cohen said in a recent speech,

[31a] "The corporation *as an institution* is, in fact, invested with *political* powers * * * our democratic ideals require that political power be limited; that countervailing power be maintained; that power be responsive to the community's needs and aspirations; and that legitimate power be non-authoritarian * * * The exercise of political power (whether by Government or business) cannot be legitimate unless it is non-authoritarian—that is, unless it is subject to free and systematic analysis and criticism—what I have termed institutional criticism." (Original emphasis)

We agree with these statements, and we suggest that the Commission's Proxy Rules afford a mechanism whereby this

institutional criticism can be exercised. As American corporations become increasingly political, it would be unfortunate indeed if stockholders were precluded from having a forum for expressing their views with respect to politically related corporate actions.

V. Conclusion

For the foregoing reasons, we submit that the resolution of the Medical Committee for Human Rights is a proper subject for shareholder action under the Commission's Proxy Rules and we request that the Commission take appropriate action to compel its inclusion in the proxy statement.
[32a] We would be pleased to present our views orally if the Commission believes such presentation would be helpful.

Sincerely,

Arnold & Porter

By

Jeffrey D. Bauman.

cc: Mr. H. D. Doan, President, Dow Chemical Company
Mr. H. H. Dow, Secretary, Dow Chemical Company
Dr. Quentin D. Young

Enclosure

[33a]

[The New York Times, Monday, February 10, 1969]

Dow Recruiters Try A New Tactic; Hope To Counter Protests on Campus Over Napalm

(By Jerry M. Flint, Special to The New York Times)

Detroit, Feb. 8—For recruiters of the Dow Chemical Company it's that time again—when they pack ham sandwiches in their briefcases.

The 1969 college recruiting season is starting and the sandwiches are no joke. Harvard holds the inter-collegiate record for imprisoning a Dow recruiter seven hours. But after one week and five campus visits in the new season the Dow men do not have a campus demonstration to their credit.

One was scheduled in Oregon last week but a snowstorm canceled the recruiting and the protest, Dow said. The protests have arisen because the company makes napalm, a flammable compound used in the Vietnam war.

Dow is now more concerned with rebuilding its campus image and has gone into what it calls "phase three" of its public relations effort to counter the napalm publicity. Its officials also believe demonstrators may be turning to "secondary targets" or other companies for future attacks.

"We've become one of the best known companies in America," said Ellis Brandt, the company's public relations director, as he explained Dow's strategy to fellow publicists last week.

CAMPUS FIGURE CITED

"Ninety per cent of the campus population can tell you Dow makes napalm. Two years ago it was less than 1 per cent."

While the company insists it has lost neither business nor employees because of the demonstrations, Mr. Brandt said:

"What we are afraid of is that we may be losing the more sensitive and creative employes. Those are just the ones you want."

In phase three, Dow is trying to carry out a "business-student dialogue" in student newspaper advertisements. The company brought college newspaper editors to its Midland, Mich., headquarters in the fall for talks with Dow executives.

The company does not claim any converts but says it may be winning the respect of campus leaders.

Joel R. Kramer, who made the trip to Midland for The Harvard-Crimson, wrote in his paper:

"What was most irritating about their collective stand was the unstated premise that anything you do is all right, provided you are willing to talk about it. It was a gap between people who enjoyed working for a profit, who accepted money flow as a measure of their success, and people like me who felt uncomfortable all day with the idea."

After a two-hour meeting with Dow's president "most of the editors remained confused as to the clarity of Dow Chemical's policies," wrote Stan Chess in The Cornell Daily Sun, adding that most editors "felt that the explanations for policy were primarily defensive and were rarely the reasons employed in the actual decision making."

DIRECT DEBATE DEPLORED

Dow does not want direct debates on the campus, Mr. Brandt said, because sometimes this allows the Dow man to

become "trapped" into appearing to defend "the whole sorry mess of the war." He also noted two small recent demonstrations against other companies, Olin Mathieson and Litton Industries, as signs that the protesters may be moving "to secondary target companies."

Dow has counted 203 campus demonstrations against the company in the last three years plus several dozen more at plants, offices and foreign installations.

Phase one of Dow's public relations answer to the attacks was mainly an attempt to play down Dow's connection with napalm, Mr. Brandt said. The company put out a statement in the name of its president, Herbert Doan, saying Dow endorsed the right of protest but considered it "simple good citizenship" to supply the Government.

But phase one ended and phase two began in the fall, 1967, when the protests grew from picketing to "stopping what they called immoral acts," he said.

To answer the more violent protests, Dow began trying to "spot trouble in advance and going to meet it." This included trying to pick the campuses that would be the scene of violence, sending out a public relations advance man to talk to local news and college officials, leaving them a 12-page report on Dow's business plus reprints of articles with the military view on napalm and medical statements denying civilian casualties from the compound.

[34a]

THE DOW CHEMICAL COMPANY,
General Office Building, 2030 Abbott Road Center,
Midland, Michigan 48640, March 7, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Avenue,
Washington, D.C. 25049
Att'n: M. E. Jaffe, Esq.
Division of Corporation Finance

Re: *File No. 1-3433, The Dow Chemical Company*

GENTLEMEN: According to the records of our transfer agent, The Cleveland Trust Company, the Medical Committee for Human Rights first became a stockholder of record of The Dow Chemical Company with the transfer to it of its five shares on March 22, 1968.

The Medical Committee's Dow Common Stock was registered in its name eleven days after the Medical Committee's original letter to Dow of March 11, 1968, presenting a proposed amendment to the Composite Certificate of Incorporation prohibiting the sale of napalm by the Company.

The timing of the 1968 letter in relation to the date of acquisition of these shares (acquired by gift, according to the March 11, 1968, letter) clearly negates the genuineness of the declaration of concern for Dow's public image set forth in the Medical Committee's letters in 1968 and 1969. The status of the Company as a supplier of napalm to the United States Department of Defense was well known prior to March, 1968, and the Medical Committee acquired the shares of Dow stock with full knowledge of Dow's public image in this respect.

The Medical Committee itself admitted that it submitted its 1968 proposal primarily for the purpose of "Promoting general economic, political, racial, religious, social or similar causes" [Rule 14a–8(c)(2)] when it said in its March 11, 1968, letter

> "Finally, we wish to note that our objections to the sale of this product is primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for [35a] our company's business as it is being used in the Vietnamese War."

Mr. Quentin D. Young's January 6, 1969, letter to Mr. W. A. Groening, clearly indicates that the Medical Committee's 1969 request is a continuation of the 1968 request, and adds as an additional reason for its request the

> "even more compelling feature of peace negotiations, which may well make termination of the use of our products against humans a reality, at least in Vietnam."

This additional reason is clearly for the purpose of promoting a general political, social or similar cause.

Please feel free to call upon Mr. Groening or me at any time if the Commission needs any additional information or co-

operation from Dow to assist it in reaching a decision on this matter.

Very truly yours,

R. W. BARKER,
Assistant General Counsel.

cc: Dr. Quentin D. Young
Member, Executive Committee
Medical Committee for Human Rights
1512 East 55th Street
Chicago, Illinois 60615

[36a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, March 14, 1969.

JEFFREY BAUMAN, ESQUIRE,
ARNOLD & PORTER,
1229 19th Street, Washington, D.C.

Re: *The Dow Chemical Company, File No. 1-3433*

DEAR MR. BAUMAN: Enclosed is a copy of our February 18, 1969 letter to Dow Chemical Company.

Sincerely yours,

WILLIAM E. TOOMEY,
Assistant Chief Counsel,
Division of Corporation Finance.

Enclosure

[37a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W., Washington, D.C. 20036.

March 17, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549
(Attention: Courtney Whitney, Jr., Esq. Chief Counsel, Division of Corporation Finance)

GENTLEMEN: Enclosed is a letter concerning the resolution proposed by the Medical Committee for Human Rights for inclusion in the proxy statement of Dow Chemical Company

in connection with the forthcoming annual meeting of stockholders to be held on May 7, 1969. We hereby renew our request that the decision of the Division of Corporation Finance to permit Dow to exclude this proposal be reviewed by the Commission, and we respectfully request that the enclosed letter be sent in its entirety to the Commission together with whatever other material the Division may deem appropriate.

If you have any questions on this matter, please contact the undersigned.

Sincerely,

ARNOLD & PORTER
By JEFFREY D. BAUMAN.

Enclosure

[38a]

ARNOLD & PORTER,
1229 Nineteenth Street, N.W.,
Washington, D.C. 20036, March 17, 1969.

SECURITIES AND EXCHANGE COMMISSION,
500 North Capitol Street, N.W., Washington, D.C. 20549

GENTLEMEN: On March 7, 1969, the management of Dow Chemical Company submitted a letter to the Division of Corporate Finance, apparently in response to our letter to the Commission in this matter dated February 28, 1969. We believe that Dow's submission misconceives the issues presented for the Commission's decision.

In confining its response to making various allegations about the subjective motives of the shareholder in proposing the resolution for consideration at the annual meeting, Dow management does not meet the arguments made on page 5 of our letter of February 28, 1969. As we pointed out, a proposal cannot be excluded under Rule 14a–8(c)(2) at all unless it concerns a "*general* economic, political * * * cause." All corporate actions, of course, have economic, political, or social aspects and consequences. The phrase "general cause" in the Rule is necessarily a limiting term, and a term of art. Which shareholder proposals concern such *general* causes, and which do not, is determined by an objective test, as the background and history of the Rule make clear. That test, simply [39a] stated, is whether the proposal has to do with the direct business concerns of the shareholders *as shareholders,* that is, with matters over which the Corporation has control.

There can be no question that the shareholder proposal in question here meets this objective test. Unlike the proposed resolution "the antitrust laws and the enforcement thereof [should] be revised"—one of the examples of propositions "of a similar nature" in Securities Exchange Act Release No. 3638 which flesh out the term "general political [etc.] cause" in Rule 14a–8(c)(2) this proposal has to do with the most direct concern of all shareholders, the prospects for maximum profitability of the company in comparison with its competitors. The Company's management has declared to the shareholders:

> "[W]e as a company have made a *moral judgment* on the long-range goals of our government and we support these. * * * From a long range viewpoint *we could be hurt in many ways.*" (Statement by Dow President H. D. Doan. The Dow Diamond No. 4, 1967, attached as Annex A.) [Emphasis added]

Shareholder consideration of the advisability urging the preparation of an amendment to the Company's Certificate of Incorporation, to protect the Corporation from such economic harm incurred by reason of a moral judgment, is clearly proper. An amendment to its own certificate, defining the scope of its business operations, is clearly a matter over which the Corporation has control. Since the proposed resolution meets the initial test—that it not concern merely a *general* political, social or economic cause—it falls outside the exception defined in Rule 14a–8(c)(2), regardless of whether its subjective motivation, like that of Company management, is also moral.

Sincerely,

ARNOLD & PORTER

By JEFFREY D. BAUMAN.

cc: Mr. H.D. Doan, President,
Dow Chemical Company

[40a]

(In response to many inquiries concerning the production of napalm, Dow President H. D. Doan in this statement has outlined the company's position)

"DOW WILL DIRECT ITS EFFORTS TOWARD A BETTER TOMORROW"

(By H. D. Doan, *President*, The Dow Chemical Company)

A letter writer complained to a Chicago newspaper recently that The Dow Chemical Company was getting a million dollars

worth of free publicity from anti-war protests on college campuses.

This kind of publicity we don't need, for it fixes us in the public mind only as the company that makes napalm. There's a real risk, in fact, in the article which follows for it adds more mileage to what has already been a grossly overexposed subject. But the risk is worth it if we can clear up a few of the issues in the controversy which seems to swirl about our company.

Dow does make napalm under contract for the U.S. government and has done so for about three years. We did not develop the product. Napalm was first developed in 1942 and has been used in warfare by many nations since that time. Dow was asked to bid on a contract for its production in 1965 when the Air Force developed a new formulation incorporating polystyrene as a principal ingredient. Dow is a leading producer of polystyrene, a plastic raw material. There have been other producers of napalm but Dow at present is the only producer.

The contract has little economic significance to Dow. It amounted to less than one half of one percent of total sales last year—in the range of $5 million—and an even smaller percentage of total profits. This year it will be in the range of one-fourth of one percent and again a smaller percentage in profits. We are not a major [41a] defense contractor. All of our business to all branches of government comes to less than five percent of sales.

Why do we produce napalm? In simplest terms, we produce it because we feel that our company should produce those items which our fighting men need in time of war when we have the ability to do so.

A quarter of a century ago this answer would have satisfied just about anyone who asked this question. Today, however, it doesn't. Today we find ourselves accused of being immoral because we produce this product for use in what some people consider an unjust war. We're told that to make a weapon because you're asked to do so by your government puts you in precisely the same position as the German industrialists who pleaded at the Nuremberg Trials that they were "only following orders."

And these are just a few of the milder charges in a barrage of protest that has included picketing of some of our plants and sales offices, boycotts against our products, thousands of letters of protest to the company and to individuals within the com-

pany, and, most publicized of all, organized demonstrations on campuses across the nation which have ranged from peaceful protest to violence and physical obstruction of Dow job interviews.

"THERE COULD BE NO OTHER CHOICE * * *"

The central issue, of course, is the war in Vietnam. This is not a popular war. No one likes war, least of all the men who have the dirty and dangerous and heartbreaking job of having to fight it. All of the debate in the world about how we got there or how we get out is proper and right in its place but it doesn't change the fact that we are there nor the fact that our men are there and need weapons to defend themselves.

When Dow first began to face this protest movement, more than a year ago, our board of directors took another look at its original decision to make this product for our government. We discussed at great length among ourselves the very serious charges and protests against us and finally resolved that there could be no other choice but to continue making this product.

"MEN IN VIETNAM CONFIRM OUR REASON"

In recent weeks, since the increased publicity about campus protests against Dow, we've begun to hear from the men in Vietnam in letters that confirm our reason for this decision. A Congressional Medal of Honor winner has written, for instance, "War and killing is not at all pleasing to anyone. The infantry in Viet Nam fights to win and *stay alive*. We need and are thankful for napalm."

An army enlisted man writes: "The war would not end if companies such as yours suddenly refused to manufacture napalm and other military supplies."

An infantry captain: "Your napalm has saved the lives of countless American soldiers."

Fourteen GIs signed a letter including this comment: "The effectiveness of napalm in saving U.S. lives is overwhelming."

And a Marine Corps lieutenant: "War is never a pleasant form of existence, but we believe we are here to further the cause of peace, and stem the tide of communism. Napalm is just one of the instruments which we must use to support ourselves."

Protesters argue, however, that napalm is an immoral product in and of itself and that it is used indiscriminately against civilians in Vietnam. Many protest leaders will readily admit, in fact, that Dow has become a focal point for protest because of the emotions that can be aroused by napalm.

Secretary of Defense Robert S. McNamara has said of these charges in a recent letter to Dow, "The implication that napalm is used indiscriminately in Vietnam is not true. General Earle G. Wheeler, Chairman of the Joint Chiefs of Staff, has said publicly that napalm is a military necessity. It answers a specific military need in certain combat situations peculiar to the type of warfare practiced by the Viet Cong.

"General Wheeler has also pointed out that the precautions we take against injury by this weapon to noncombatants are as painstaking as we can make them without hamstringing our military operations," Secretary McNamara continued. "By contrast, the Viet Cong has repeatedly carried on terror and murder campaigns directed against innocent civilians."

"NAPALM ANSWERS MILITARY NEED"

Other sources, including combat veterans of Vietnam in their letters to us and in conversations with our people, add further confirmation to what General Wheeler has said.

[42a] But what of the argument that we are no different from the German industrialists who "just followed orders"?

We reject this argument on several points. First we reject the validity of comparing our present form of government with Hitler's Nazi Germany. In our mind our government is still representative of and responsive to the will of the people.

Further, we as a company have made a moral judgment on the long-range goals of our government and we support these. We may not agree as individuals with every decision of every military or governmental leader but we regard these leaders as men trying honestly and relentlessly to find the best possible solutions to very, very complex international problems. As long as we so regard them, we would find it impossible not to support them. This is not saying as the critics imply that we will follow blindly and without fail no matter where our government leads us. While I think it highly improbable under our form of government, should despotic leaders attempt to lead our nation away from its historic national purposes, we would cease to

support the government. But I can foresee this happening only if through resort to anarchy we prevent the functioning of democratic processes.

Our critics ask if we are willing to stand judgment for our choice to support our government if history should prove this wrong. Our answer is yes.

On the related issue of campus recruiting we feel that we have the right and the responsibility to meet on campus with students who want to discuss job opportunities with our company representatives. This is no sinister activity but rather a routine function, provided at most colleges for the mutual benefit of students and business, which allows large and small businesses an equal chance to make themselves available to interested students.

When college officials request us to postpone or cancel recruiting visits, of course, we do so. We have found, however, that college officials in general have been extremely helpful and cooperative despite the problems which have arisen on various campuses.

"WE ARE WILLING TO STAND JUDGMENT"

Has Dow been hurt by the various kinds of protests? This is difficult to answer without qualification. We can detect no effect on our sales, for example. And early in the recruiting season our number of interviews was up sharply. These are still running ahead of a year ago. We can detect no decline in the quality of students with whom we conduct interviews. And while we have had some stockholders sell their Dow stock in protest to our stand on this issue, we can't really gauge the effect in this area.

Yet in the minds of some people we are becoming the company that produces napalm rather than a highly diversified company producing more than 800 products basic to all other industries and ranging from measles vaccine to brake fluids and antifreezes. There may be outstanding businessmen or scientists of the future who have been lost to Dow because of deep personal feelings on this matter or simply because somehow they were deprived of the chance to talk to our representative. From a long-range [43a] viewpoint we could be hurt in many ways.

We point this out not in a plea for sympathy but as a simple fact. Certainly no problem we face now and in the future can compare to those faced by the men who are fighting this war and by their families.

But there may also be in this situation both for Dow and for business in general some very real opportunities. One of these may be a start toward more meaningful dialogue between business and the campus and other groups who have joined in this protest.

Basically the debate over Vietnam, as long as it remains peaceful and honest debate, is a healthy thing. And many of the questions being asked are pertinent questions which business must ask itself. Business should and must be willing to discuss some of these questions with the campus and intellectual community which has raised them—discuss them not in the emotional atmosphere of demonstrations and confrontations but under conditions which will allow a true dialogue. The issue of business making moral judgments, the issue of duty to country deserve thoughtful discussion. This is not to say that business can or should debate specific U.S. foreign policy decisions.

"WE MUST FOCUS ATTENTION ON PEACE"

Equally important, however, is the challenge to Dow and to the business world to focus attention and action on an issue far more vital than Vietnam. That issue is peace itself, the lasting peace that man has sought throughout history. Such a lasting peace can be achieved only when we find solutions to such basic world problems as hunger and disease and lack of economic opportunity.

We need to change wild jungles to productive croplands, to increase crop yields and find better ways to process and preserve the crops that are abundant, to increase meat production efficiency, to improve our recovery of natural mineral or petroleum resources, to bring industry to undeveloped lands and thus provide an economic base for sound growth, to help clean up and protect valuable water resources threatened by pollution, to bring the rest of the world's standard of living closer to our own.

These are things that Dow is working on right now—things on which we spend far more time and money and effort than we spend on the production of napalm. We intend to continue making napalm because we feel that so long as the United States is sending men to war it is unthinkable that we would not supply the materials they need. But we also intend to con-

tinue to direct our talents and efforts toward that better tomorrow for all mankind that can build lasting peace.

This we feel is the real challenge of business that calls for the kind of dedication and zeal and concern for mankind that is being manifested in much of this campus protest. We firmly believe that the young men and women truly concerned about doing something to build a better world rather than just talking about it are in the vast majority. We intend to make every effort to convince them that the business world offers one of the best opportunities to do that job effectively.

Why Dow Recruits on College Campus

The target of most anti-war protests against Dow has been the recruiting representative sent to a college to interview students interested in talking about a job with the Company.

The Dow recruiting staff consists of 15 full-time men plus 250 technical and professional employees who take about a week from their regular jobs to interview students on campus.

This school year the recruiting staff will visit 330 colleges and universities and conduct more than 11,000 interviews.

This extensive and highly organized activity is an indication of the highly competitive nature of acquiring college trained talent; an almost complete reversal of the traditional hiring practices of 20 or more years ago.

Prior to the end of World War II, most graduating students would write to companies in which they were interested. Few firms bothered to send a representative to campuses or actively solicited interviews.

In recent years demand for college graduates, particularly in the technical disciplines, has soared. At the same time, the number of B.S.-level graduates available for employment in industry has dwindled; larger proportions are going on to higher degrees or going into teaching or government jobs.

For example, in a recent year there were less than 4,000 chemical engineers graduating at the B.S. and M.S. levels in the U.S. Of these, less than 2,400 were available for employment because of graduate school, military commitment and other reasons.

One result of this trend: at one Big Ten school last year, more than 2,000 employers sent representatives to the campus and conducted 18,000 interviews.

Another result has been the growing need for the professional college placement officer. The placement officer helps faculty

members by relieving them of the extra curricular chore many of them had acquired of serving as a contact between students and employers. He helps students by setting up a central, convenient location for scheduling and conducting interviews. He helps employers by setting up schedules, providing a mutually convenient location and screening out obviously unqualified candidates (e.g., sophomores and juniors).

In the process, the placement officer also performs a valuable guidance and career counseling service which has undoubtedly helped many youngsters to avoid costly career mistakes. The placement officer has also been able to raise and enforce ethical standards of interviewing and hiring on the part of employers.

Because of the professional nature of the college placement function and the important role it plays in maintaining high standards in the recruiting process, Dow's Corporate Recruiting Department is firmly committed to supporting placement officers and to conducting its college interviews through the official campus placement centers.

[44a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, April 2, 1969.

JEFFREY D. BAUMAN, Esq.,
Messrs. ARNOLD & PORTER,
1229 Nineteenth Street, NW., Washington, D.C. 20036
Re: The Dow Chemical Company
File No. 1–3433

DEAR MR. BAUMAN: This is with respect to the inclusion in the proxy statement of The Dow Chemical Company for the 1969 annual meeting of shareholders of a proposal concerning an amendment to the Company's Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings which was submitted by the Medical Committee for Human Rights in a letter to Dow Chemical Company dated January 6, 1969 and the alternative proposal requesting that the Board of Directors of the Company consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation that the Company shall not make napalm which was submitted by the Medical Committee for Human Rights to Dow Chemical Company on February 7, 1969.

The Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omits the proposals from its proxy statement for the forthcoming meeting of shareholders.

Very truly yours,

COURTNEY WHITNEY, Jr.,
Chief Counsel,
Division of Corporation Finance.

[45a]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549, April 2, 1969.

W. A. GROENING, Jr., Esq.,
General Counsel, The Dow Chemical Company,
2030 Abbott Road Center, Midland, Michigan 48640
Re: File No. 1–3433

DEAR MR. GROENING: This is with respect to the inclusion in the proxy statement of The Dow Chemical Company for the 1969 annual meeting of shareholders of a proposal concerning an amendment to the Company's Composite Certificate of Incorporation to provide that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that this substance will not be used on or against human beings which was submitted by the Medical Committee for Human Rights in a letter to the Company dated January 6, 1969 and the alternative proposal requesting that the Board of Directors of the Company consider the advisability of adopting a resolution setting forth an amendment to the Composite Certificate of Incorporation that the Company shall not make napalm which was submitted by the Medical Committee for Human Rights on February 7, 1969.

The Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the subject proposals are omitted from the Company's proxy statement for the forthcoming annual meeting of shareholders.

Very truly yours,

COURTNEY WHITNEY, Jr.,
Chief Counsel,
Division of Corporation Finance.

[46a]

10:00 A.M. MARCH 24, 1969.

Re: Dow Chemical Company, (File 1–3433)

Reference was made to proxy material filed pursuant to Regulation 14 of the Rules and Regulations under the Securities Exchange Act of 1934 by Dow Chemical Company (File 1–3433) for use in connection with its annual meeting of stockholders scheduled for May 7, 1969.

Upon the recommendation of the Division of Corporation Finance contained in two memoranda dated March 18, 1969, the Commission determined to raise no objection to the omission from the management's proxy statement of certain resolutions proposed by the Medical Committee for Human Rights. The Commission also denied the request of counsel for the Committee to be heard by the Commission in the matter.

ORVAL L. DUBOIS, *Secretary.*

United States Court of Appeals for the District of Columbia Circuit

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

against

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

MOTION TO DISMISS PETITION FOR REVIEW

The Securities and Exchange Commission respectfully moves this Court for an order dismissing the petition for review filed by the Medical Committee for Human Rights because this Court lacks jurisdiction:

1. The Medical Committee is not a person aggrieved by any order issued by the Commission in a proceeding under the Securities Exchange Act to which the Medical Committee is a party;

2. The petition for review relates solely to matters committed to Commission discretion by law;

3. The Medical Committee has suffered no legal wrong because of Commission action nor has it been adversely affected or aggrieved by Commission action within the meaning of any relevant statute;

4. Even if it were assumed that the matters raised by the petition are proper subjects for judicial review, this Court is not a court of competent jurisdiction under any relevant statute.

Respectfully submitted,

DAVID FERBER,
Solicitor.
RICHARD E. NATHAN,
Attorney.
SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C. 20549.

Washington, D.C.
July 8, 1969

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1969

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

Before: McGowan, Tamm and Leventhal, Circuit Judges, in Chambers.

ORDER

This cause came on for consideration on respondent's motion to dismiss the petition for review herein, and the Court heard argument of counsel. On consideration thereof, it is

ORDERED by the Court that respondent's aforesaid motion to dismiss is denied without prejudice to renewal thereof in the briefs and at the argument on the merits.

Per Curiam.

Circuit Judge Tamm would grant respondent's motion to dismiss.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

AFFIDAVIT

CITY OF WASHINGTON,
District of Columbia, ss:

MATTHEW E. JAFFE, being duly sworn, deposes and says:

(1) I am an attorney employed in the Division of Corporation Finance of the Securities and Exchange Commission since April 1967, and in the course of such employment I have become familiar with the facts underlying this proceeding.

(2) On March 24, 1969, Courtney Whitney, Jr., Chief Counsel of the Division of Corporation Finance, instructed me to inform by telephone counsel for Dow Chemical Company ("Dow") and the Medical Committee for Human Rights ("Medical Committee") of the Commission's determination that day not to take any action if a certain proposal of the Medical Committee were omitted from Dow's proxy statement in connection with Dow's 1969 annual meeting. That same day, I called Mr. Jeffrey Bauman, counsel to the Medical Committee, and Mr. Walter Groening, counsel to Dow, and informed them of the Commission's determination. Subsequently, letters noting the Commission's determination were sent to these gentlemen.

(3) Further affiant sayeth not.

MATTHEW E. JAFFE.

Sworn to before me this 18th day of December, 1969.

JUANITA L. WARD,
Notary Public.

My Commission Expires May 31, 1974.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

Petition for Review of an Order of
the Securities and Exchange Commission

Decided July 8, 1970

Mr. Roberts B. Owen, with whom *Messrs. Edwin M. Zimmerman, Richard B. Herzog* and *Paul S. Hoff* were on the brief, for petitioner.

Mr. Richard E. Nathan, Special Counsel, Securities and Exchange Commission, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Messrs. Philip A. Loomis Jr.,* General Counsel, and *David Ferber,* Solicitor, Securities and Exchange Commission, were on the brief, for respondent.

Before McGOWAN, TAMM, and ROBINSON, *Circuit Judges.*

TAMM, *Circuit Judge*: The instant petition presents novel and significant questions concerning implementation of the concepts of corporate democracy embodied in section 14 of the Securities Exchange Act of 1934, and of the power of this court to review determinations of the Securities and Exchange Commission made pursuant to its proxy rules. For reasons to be stated more fully below, we hold that the Commission's action in the present case is reviewable, and that the cause must be remanded for further administrative proceedings.

I. PROCEDURAL HISTORY OF THE CASE

On March 11, 1968, Dr. Quentin D. Young, National Chairman of the Medical Committee for Human Rights, wrote to the Secretary of the Dow Chemical Company, stating that the Medical Committee had obtained by gift several shares of Dow

stock and expressing concern regarding the company's manufacture of the chemical substance napalm.[1] In part, Dr. Young's letter said:

> After consultation with the executive body of the Medical Committee, I have been instructed to request an amendment to the charter of our company, Dow Chemical. We have learned that we are technically late in asking for an amendment at this date, but we wish to observe that it is a matter of such great urgency that we think it is imperative not to delay until the shareholders' meeting next year. * * *
>
> We respectfully propose the following wording to be sent to the shareholders:
>
> > "RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."

(App. 1a–2a.) The letter concluded with the following statement:

> Finally, we wish to note that our objections to the sale of this product [are] primarily based on the concerns for human life inherent in our organization's credo. However, we are further informed by our investment advisers that this product is also bad for our company's business as it is being used in the Vietnamese

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[1] Napalm is described as follows in 15 ENCYCLOPAEDIA BRITANNICA 1170 (1968):

> [T]he aluminum soap of naphthenic and palmitic acids which, when mixed with gasoline, forms a sticky sirup used in chemical warfare.
>
> In World War I both Germany and the Allies used raw gasoline in flame throwers * * * but it burned too quickly to be fully effective. What was needed was a thickener that would slow down the rate of burning and increase the range of the weapon. Napalm did this, and it also greatly raised the temperature at which the fuel burned. Harvard university scientists, in cooperation with the U.S. army chemical warfare service, developed the substance in 1942.

> War. It is now clear from company statements and press reports that it is increasingly hard to recruit the highly intelligent, well-motivated, young college men so important for company growth. There is, as well, an adverse impact on our global business, which our advisers indicate, suffers as a result of the public reaction to this product.

(App. 2a.) Copies of this letter were forwarded to the President and the General Counsel of Dow Chemical Company, and to the Securities and Exchange Commission. (App. 3a.)

By letter dated March 21, 1968, the General Counsel of Dow Chemical replied to the Medical Committee's letter, stating that the proposal had arrived too late for inclusion in the 1968 proxy statement, but promising that the company would "study the matter and * * * communicate with you later this year" regarding inclusion of the resolution in proxy materials circulated by management in 1969. (App. 4a.) Copies of this letter, and of all subsequent correspondence, were duly filed with the Commission.

The next significant item of record is a letter dated January 6, 1969, noting that the Medical Committee was "distressed that 1968 has passed without our having received a single word from you on this important matter," and again requesting that the resolution be included in management's 1969 proxy materials. (App. 7a–8a.) The Secretary of Dow Chemical replied to this letter on January 17, informing the Medical Committee that Dow intended to omit the resolution from its proxy statement and enclosing an opinion memorandum from Dow's General Counsel, the contents of which will be discussed in detail in part III, *infra*. (App. 9a–12a.) On February 3 the Medical Committee responded to Dow's General Counsel, asserting that he had misconstrued the nature of their proposal in his opinion memorandum, and averring that the Medical Committee would not "presume to serve as draftsmen for an amendment to the corporate charter." (App. 15a.) The letter continued:

> We are willing to bend * * * to your belief that the management should be allowed to decide to whom and under what circumstances it will sell its products. Nevertheless, we are certain that you would agree that the company's owners have not only the legal power but also the historic and economic obligation to determine what

products their company will manufacture. Therefore, [we submit] * * * our revised proposal * * * requesting the Directors to consider the advisability of adopting an amendment to the corporate charter, forbidding the company to make napalm (any such amendment would, of course, be subject to the requirements of the "Defense Production Act of 1950," as are the corporate charters and management decisions of all United States Corporations), [and] we request that the following resolution be included in this year's proxy statement:

> "RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the laws [*sic*] of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm."

(App. 16a.) On the same date, a letter was sent to the Securities and Exchange Commission, requesting a staff review of Dow's decision if it still intended to omit the proposal, and requesting oral argument before the Commission if the staff agreed with Dow. (App. 17a.)

On February 7, 1969, Dow transmitted to the Medical Committee and to the Commission a letter and memorandum opinion of counsel, which in essence reiterated the previous arguments against inclusion of the proposal and stated the company's intention to omit it from the proxy statement. (App. 18a–19a.) Shortly thereafter, on February 18, 1969, the Commission's Chief Counsel of the Division of Corporation Finance sent a letter to Dow, with copies to the Medical Committee, concluding that "[f]or reasons stated in your letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action * * * if this proposal is omitted from the management's proxy material * * *." (App. 20a.) In a letter dated February 28—which contains the first indications of record that petitioners had retained counsel—the Medical Committee again renewed its request for a Commission review of the Division's decision. (App. 24a.) On the same day, the Medical Committee filed with the Commission a memorandum of legal

arguments in support of its resolution, urging numerous errors of law in the Division's decision. (App. 26a–32a.) Several other documents were filed by both the company and the Medical Committee; finally, on April 2, 1969, both parties were informed that "[t]he Commission has approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omits the proposals from its proxy statements for the forthcoming meeting of shareholders." (App. 44a–45a.) The petitioners thereupon instituted the present action, and on July 10, 1969, the Commission moved to dismiss the petition for lack of jurisdiction. On October 13 we denied the motion "without prejudice to renewal thereof in the briefs and at the argument on the merits."

In its briefs and oral argument, the Commission has consistently and vigorously urged, to the exclusion of all other contentions, that this court is without jurisdiction to review its action. We find this argument unpersuasive.

II. Jurisdiction to Review

A. TIMELINESS

The Commission's first argument on the jurisdictional point is that the instant petition was untimely filed, thereby depriving this court of power to adjudicate the controversy. This argument is based upon the provision of section 25(a) of the Securities Act, 15 U.S.C. § 78y(a)(1964), which requires that a petition for review must be filed "within sixty days after the entry" of a Commission order.

In the instant case the Commission's minutes reflect that the decision which was reached after reviewing the petitioner's proxy claim was made on March 24, 1969 (App. 46a), whereas the petition to review in this court was not filed until May 29, 1969—some 66 days thereafter. It also appears uncontroverted that the Commission gave the Medical Committee some notification by telephone on March 24 that a decision had been reached, although the substance of this conversation is not reproduced in the briefs or record. (*Cf.* Supp. App. 3.) However, as we noted in the preceding section, petitioners did not receive any written information concerning the Commission's decision until a letter was mailed to them on April 2; in addition, the Medical Committee has asserted, without contradiction, that the Commission temporized for approximately four weeks after

the petitioner requested a formal copy of the minutes of the decision, before making this important information available. (Reply Brief for Petitioner at 14 n.2 and accompanying text.)

It must be noted that the Commission is itself rather untimely in making this assertion of untimeliness, for in its July 10 Motion to Dismiss it explicitly disclaimed any intention to press upon us an argument relating to the time of filing the instant petition.[2] This resolve apparently fell by the wayside, however, and the timeliness argument appeared in full dress in the Commission's responsive brief on the merits, thereby helping to trigger further rounds of briefing by both sides. We need not elevate the Commission's vacillation to the status of a waiver, however, because we have concluded that its timeliness argument must fail on the merits.

The Commission relies primarily upon section 22(k) of its Rules of Practice, 17 C.F.R. § 201.22(k) (1970), which provides:

> In computing any period of time involving the date of the entry of an order by the Commission, the date of entry shall be (1) the date of the adoption of the order by the Commission * * * or (2) in the case of orders reflecting action taken pursuant to delegated authority, the date when such action is taken * * *. *The order shall be available for inspection by the public from and after the date of entry, unless it is a non-public order. A non-public order shall be available for inspection from and after the date of entry by any person entitled to inspect it.* [Emphasis added.]

In essence, the Commission has taken the position that the date of decision, March 24, must be deemed the date of "entry" within the meaning of Rule 22(k), notwithstanding the language of the rule italicized above, and notwithstanding the fact that no written information regarding the basis of the decision was available until a substantial time after March 24.

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[2] Memorandum in Support of Respondent's Motion to Dismiss Petition for Review at 5 n.2:

> This court may, alternatively, be without jurisdiction based upon the Medical Committee's failure to file its May 29 petition to review "within sixty days after the entry of" the alleged order * * *. *We do not urge the point, however, since the Commission's staff did not advise the Medical Committee of the Commission's March 24 decision * * * until April 2 * * *.* [Emphasis added.]

None of the cases cited by the parties offers much guidance in resolving the particular timeliness question now before us:[3] however, we think it clear that Rule 22(k), together with the 60-day statutory period for filing petitions for review, evidences an attempt by Congress and the Commission to strike a balance between the need to have Commission orders operate with finality, and the aggrieved party's need to have both adequate notice of the substance of the decision, and sufficient time to prepare his petition.[4] To hold that the running of the 60-day period can be initiated by a mere telephone call, as the Commission urges, would create risk of inequity and hardship to aggrieved parties and defeat the goal of orderly and open administrative procedures embodied in the italicized portions of Rule 22(k) quoted above. Therefore, we conclude that the instant petition for review is not barred for reasons of untimeliness.

B. THE EXISTENCE OF A REVIEWABLE ORDER

The most difficult problems presented by this case arise from a congeries of related arguments supporting the general assertion that the Commission's decision regarding the Medical Committee's proxy proposal is not a reviewable order within the relevant jurisdictional statute. That statute is section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(a) (1964), which in pertinent part states:

> Any person aggrieved by an order issued by the Commission in a proceeding under this chapter to which

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[3] Lile v. SEC, 324 F.2d 772 (9th Cir. 1963), which seems most directly apposite to the facts of the instant case, was decided prior to the adoption of the present version of Rule 22(k). *See* 29 Fed. Reg. 3424 (1964). Moreover, the discussion of the timeliness problem in *Lile* appears to be dictum, since the case was decided on the ground of exhaustion of administrative remedies. However, to the extent that the discussion in *Lile* is useful to elucidate the present inquiry, it militates against the Commission's argument: the text of that opinion clearly reflects the court's concern that orders which assertedly had the effect of starting the running of the 60-day review period were not readily available for public inspection. *See* 324 F.2d at 773.

M. G. Davis & Co. v. Cohen, 256 F.Supp. 128 (S.D.N.Y.), *aff'd*, 369 F.2d 360 (2d Cir. 1966), which the Commission relies upon, is distinguishable in that it involved a different provision of the Rules of Practice which governed the issuance of orders initiating administrative proceedings and which did not include language comparable to that contained in Rule 22(k) relating to the parties' immediate right to inspect orders affecting them.

[4] For a discussion of an analogous problem of computation arising under the Federal Rules of Civil Procedure, *see* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 632–42 (1969).

> such person is a party may obtain a review of such order * * * in the United States Court of Appeals for the District of Columbia [Circuit], by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part.

Neither precedent [5] nor the legislative history of the Securities Act [6] offers an unambiguous answer to the question of whether decisions of the kind presently before us should be categorized as reviewable orders under this provision; thus, we must resort to general principles and analogies in determining whether we have jurisdiction to adjudicate this controversy.

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[5] Dicta in a few cases and remarks by some scholarly commentators tend to indicate that it has generally been assumed that proxy decisions like the present one are not reviewable by the courts. *See, e.g.*, Klastorin v. Roth, 353 F.2d 182, 183 n.2 2d Cir. 1965; Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 N.D. LAWYER 13, 17 (1964). However, we have found no holding that proxy decisions like the present one are unreviewable, and no adequate analysis of the myriad arguments bearing on the jurisdictional question.

[6] The absence of any indication in the legislative history that Congress intended to preclude review serves to distinguish the instant controversy from Schilling v. Rogers, 363 U.S. 666 (1960), which the Commission heavily relies upon. *See, e.g.*, 363 U.S. at 671:

> The only express provision in the Trading with the Enemy Act for recourse to the courts by those claiming the return of property vested during World War II is that contained in § 9(a). That section, however, is applicable only to persons not enemies or allies of enemies as defined in the relevant statutes, and hence is not available to this petitioner, an enemy national. * * *
>
> The question then is whether a right to such relief can fairly be implied * * *. The terms of § 32 and its legislative history speak strongly against any such implication.

Cf. Heikkila v. Barber, 345 U.S. 229, 233 (1953): "Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it."

The *Schilling* case is further distinguishable because the administrative action there in issue was found to be wholly within the province of administrative discretion; *see* 363 U.S. at 674. As will be developed more fully below, we do not find the discretionary aspects of the Commission's action preclusive of review in the present controversy. Finally, it must be noted that the subject matter of the regulatory scheme in *Schilling* was permeated with overtones of foreign affairs and national defense policy—considerations which have always made the courts reluctant to review administrative action, and which obviously are totally lacking here. *See, e.g.*, Curran v. Laird, —— U.S.App.D.C. ——, 420 F.2d 122 (1969) (*en banc*).

Bypassing for the moment the question of whether deference to administrative discretion should compel us to foreclose review of this petition,[7] we begin by restating the well-established principle that there is a strong presumption in favor of the courts' power to review administrative action. As the Supreme Court concluded in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), "[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." This theme has been developed at greater length by Professor Jaffe in his study of the law of reviewability:

> Congress, barring constitutional impediments, may indeed exclude judicial review. But judicial review is the rule. * * * It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest. * * *
>
> * * * * *
>
> * * * The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 346, 357 (1965) [hereinafter "L. JAFFE"]. *See also Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op, at 7); *Scanwell Laboratories, Inc. v. Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 1–32 (1958).

Several other general observations which we have gleaned from our perusal of numerous cases and commentaries on reviewability must serve as prolegomena to our discussion of that issue in the present case. It appears that the factors most often relied upon in determining whether a particular administrative action is a reviewable order can be subdivided

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[7] *See* part II C, *infra*. Schilling v. Rogers, 363 U.S. 666 (1960), which is discussed in the preceding footnote, clearly indicates that the issue of whether particular administrative action is rendered unreviewable by implication of a statute or by pragmatic concerns should be considered a different inquiry from the question of whether agency discretion precludes review.

into two general categories. The first of these basic areas of concern involves consideration of whether the administrative action operates with final effect upon a particular individual, entity, or group.[8] *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967); *Isbrandtsen Co. v. United States*, 93 U.S. App.D.C. 293, 298, 211 F.2d 51, 55, *cert. denied*, 347 U.S. 990 (1954); L. JAFFE, 358, 403–404. The second line of analysis looks to the formalities preceding and attending the administrative action, for, as one commentator has stated, "the notion of an 'order' implies some formal characteristics." L. JAFFE 419, *cf. Helco Products Co. v. McNutt*, 78 U.S.App.D.C. 71, 137 F.2d 681 (1943); *American Sumatra Tobacco Corp. v. SEC*, 68 App.D.C. 77, 93 F.2d 236 (1937). Finally, the cases in the area seem virtually unanimous in proclaiming that pragmatic considerations, particularly those relating to the institutional relationships between the courts and the administrative agencies, must prevail over purely doctrinal arguments for or against reviewability. *See, e.g., Abbott Laboratories, supra*, 387 U.S. at 149; *American Federation of Labor v. NLRB*, 308 U.S. 401, 408 (1940); *Cities Service Gas Co. v. FPC*, 255 F.2d 860, 862 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); *Isbrandtsen Co., supra*, 93 U.S.App.D.C. at 297, 211 F.2d at 55.

While the problem of whether there is sufficient formality is admittedly difficult in the present case, we need not pause long over the question of the decision's final effect upon petitioner. Here the administrative process had run its course with respect to petitioner's proxy proposal, and there can be no basis for any fear that review of the decision would cause the courts "to interfere in matters yet within the consideration of the Commission." *Cities Service Gas Co., supra*, 255 F.2d at 862. Here, also, we are dealing with a limited and easily identifiable class of individuals—shareholders of a regulated corporation—whom Congress sought to protect in section 14 of the Act, and who claim that they are wrongfully being denied fair corporate suffrage by the Commission's approval of Dow's decision to omit their proposal. *Cf.* Jaffe, *The Individual Right to Initiate Administrative Process*, 25 IOWA L.REV. 485, 528 (1940). In this regard, we cannot see any merit in the Commission's contention

[8] Frequently these considerations are analyzed under one or more of the related doctrines of ripeness, finality, and exhaustion of administrative remedies; however, it is not uncommon to find these factors treated under the more general rubric of reviewability.

that the petitioner has not suffered any "aggrievement" under the jurisdictional statute because it may still have relief through a private action against the company in a district court. The relevance of a possible private action will be examined more fully later in this portion of our opinion. For present purposes, it is sufficient to note that the Medical Committee has been forced to undergo a two-stage administrative proceeding, compelled by the risk that failure to do so would preclude any judicial relief by virtue of the exhaustion doctrine;[9] its recourse to an authoritative judicial determination of the merits of its proxy proposal has been substantially delayed because of the administrative proceeding, whereas time is clearly of the essence in proxy contests; and not only has the Medical Committee lost the potential benefit of the Commission's resources and expertise as an ally in compliance litigation against the company, it has also had imposed upon it the added burden in a private action of overcoming an adverse Commission determination in face of the principle that the agency is entitled to judicial deference in the construction of its proxy rules. *See, e.g., Union Pacific R. Co. v. Chicago & N.W. Ry. Co.*, 226 F.Supp. 400, 408 (N.D.Ill. 1964). Moreover, we believe that there is a substantial public interest in having important questions of corporate democracy raised before the Commission and the courts by interested, responsible private parties. *Cf. Scanwell Laboratories, Inc. v. Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 8–10); *Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 5–7). Thus, we conclude that the Medical Committee is "aggrieved" for purposes of section 25(a) of the Act.

Finally, in the context of assessing the reviewability of the Commission's decision—as distinguished from our later inquiry into the scope of administrative discretion—it is clear that no significance whatsoever inheres in the fact that the administrative determination is couched in terms of a "no action" decision rather than in the form of a decree binding a party to perform or refrain from some particular act. This much has been clear ever since the Supreme Court interred the discredited "negative order doctrine" in *Rochester Telephone Corp. v. United States*.[10] That case, like the present controversy, in-

[9] *See* Peck v. Greyhound Corp., 97 F.Supp. 679 (S.D.N.Y. 1951).

[10] 307 U.S. 125 (1939). *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 87–93 (1958).

volved a petitioner's attempt to obtain judicial review of "action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person." (307 U.S. at 135.) The Court pointed out that "[n]egative has really been an obfuscating adjective" because it failed to illuminate "the real considerations on which rest * * * the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability." (307 U.S. at 141.) The Court then concluded:

> An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. * * * Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. * * * But this bears on the disposition of a case and should not control jurisdiction.

(307 U.S. at 142.) Similarly, section 10(e) of the Administrative Procedure Act provides judicial relief for "agency action unlawfully withheld or unreasonably delayed" (5 U.S.C. §706(1) (Supp. V 1965–69)), and the courts have had little difficulty in determining when an administrative failure to act presents an appropriate occasion for judicial scrutiny. *Compare Environmental Defense Fund v. Hardin, supra, with International Ass'n of Machinists v. NMB*, No. 23,409 (D.C. Cir. Jan. 30, 1970); *see generally* Goldman, *Administrative Delay and Judicial Relief*, 66 MICH.L.REV. 1423 (1968). Thus, there can be little doubt that the Commission's decision operates with sufficient particularity and finality to warrant judicial review.

The question of whether the procedures attending the Commission's decision in this case are sufficiently formal to make the determination a reviewable order under section 25(a) is admittedly a close one, but we believe that the considerations militating in favor of reviewability must prevail. At the outset, we note that the decided cases make it clear beyond doubt that the absence of a formal evidentiary hearing does not compel the conclusion that an administrative decision is unreviewable. *See, e.g., Cities Service Gas Co. v. FPC*, 255 F.2d 860, 862–63 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); *Phillips Petroleum Co. v. FPC*, 227 F.2d 470, 475 (10th Cir. 1955), *cert.*

denied. 350 U.S. 1005 (1956); *Isbrandtsen Co. v. United States*, 93 U.S.App.D.C. 293, 297, 211 F.2d 51, 55, *cert. denied*, 347 U.S. 990 (1954). This is a sound and necessary doctrine because agencies frequently are confronted with situations in which substantial questions of fact, law or policy may be properly resolved through information-gathering mechanisms less cumbersome than a trial-type hearing. This court has consistently recognized that this kind of flexibility in procedures is a desirable attribute of the administrative process, regardless of whether the power was explicitly provided by statute or rule, or was evolved on an ad hoc basis by implication from a broad statutory grant. However, our deference to the efficient deployment of administrative resources has not been—and logically could not be—considered a matter which touches upon the courts' jurisdiction to review the action in question, in the absence of a clear indication that Congress intended such a result. *See generally, National Air Carrier Ass'n v. CAB*, No. 23,012 (D.C.Cir. May 28, 1970); *H & B Communications Corp. v. FCC*, No. 22,685 (D.C.Cir. Nov. 13, 1969); *Marine Space Enclosures, Inc. v. FMC*, —— U.S.App.D.C. ——, 420 F.2d 577 (1969). Thus, we must look to the Commission' rules and to the attributes of the proceeding here in issue in order to determine whether this is an appropriate occasion for review.

Although the line is not drawn with complete clarity, the Commission's Rules of Practice distinguish between "formal" and "informal" proceedings. Procedures denominated "informal" by the Commission generally involve negotiation between the Commission and one private party, and normally culminate in a letter of advice to the party from a Commission staff member.[11] Here, however, there is an important difference which the Commission readily concedes:

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[11] 17 C.F.R. § 202.1 (1970) provides:

> The statutes administered by the Commission provide generally (1) for the filing with it of certain statements, such as * * * proxy solicitation material * * *; (2) for Commission determination through formal procedures of matters initiated by private parties or by the Commission; (3) for the investigation and examination of persons and records where necessary to carry out the purposes of the statutes * * *.
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> * * * * * *
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> (c) ***The statutes and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings.*** These are supplemented where

> The difference is that in the normal no-action situation, there is only one interested private party and accordingly the Commission has not found it necessary to prescribe any rules dealing with the situation. The private party simply writes a letter which is answered.
>
> In the case of stockholder proposals, there are two interested private parties: the management and the shareholder. Consequently, Rule 14a–8(d) provides a procedure by which the position of both may be brought to the Commission's attention.

(Supplementary Memorandum of Respondent at 10.) Thus, the Commission's procedural regulations governing proxy proposals incorporate the basic theory of an adversary encounter, and a detailed perusal of Rule 14a–8 and its history reinforces this impression.

For the shareholder who wishes to have his proposal included in management's proxy statement, Rule 14a–8, 17 C.F.R. § 240.14a–8 (1970), is the touchstone of procedural and substantive rights. Rule 14a–8(a) describes the initiation of this process by providing that the security holder "shall submit to the management of the issuer, within the time hereinafter specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting." The basic time period established in this section is 60 days, subject to

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feasible by certain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. * * *

(d) The informal procedures of the Commission are largely concerned with the rendering of advice and assistance by the Commission's staff to members of the public dealing with the Commission. [Emphasis added.]

Informal negotiation also plays a large role in Commission hearings which are indubitably formal in nature; *see, e.g.*, 17 C.F.R. § 202.4 (1970):

(a) Applications, declarations, and other requests involving formal Commission action after opportunity for hearing are scrutinized by the appropriate division for conformance with applicable statutory standards and Commission rules and generally the filing party is advised of deficiencies. * * *

(b) After the staff has had an opportunity to study an application or declaration, interested persons may informally discuss the problems therein raised to the extent that time and the nature of the case permit * * *.

(c) During the course of the hearings, the staff is generally available for informal discussions to reconcile bona fide divergent views not only between itself and other persons interested in the proceedings, but [also] among all interested persons; and, when circumstances permit, an attempt is made to narrow, if possible, the issues to be considered at the formal hearing.

certain qualifications. Subsection (b) then provides that if management opposes the shareholder's proposal, it must include in its proxy materials a 100-word statement by the proponent of the proposal. The substantive exceptions to the general rule of inclusion are then set forth in subsection (c), and several of these grounds for omitting a shareholder proposal will be discussed at length in part III, *infra*. The following provision, subsection (d), contains the procedural steps which are immediately relevant; it describes the course of proceedings which comes into play whenever management believes that it is entitled under the substantive criteria of the preceding section to omit a shareholder proposal.

Subsection (d) is phrased wholly in mandatory rather than permissive language. It requires management to "file with the Commission * * * a copy of the proposal and any statement in support thereof as received from the security holder, together with a statement of the reasons why the management deems such omission to be proper in the particular case, and, where such reasons are based on matters of law, a supporting opinion of counsel." At the same time, management must "notify the security holder submitting the proposal of its intention to omit the proposal" and "forward to him a copy of the statement of the reasons why the management deems the omission of the proposal to be proper and a copy of such supporting opinion of counsel." This filing and forwarding must be completed "not later than 20 days prior to the date the preliminary copies of the proxy statement are filed pursuant to § 240.14a–6(a)"; this requirement was promulgated "[s]o that the Commission will have more time to consider the problems involved in such cases and the security holder will have an opportunity to consider the management's position and take such action as may be appropriate." 19 Fed. Reg. 246 (1954). Presumably this "other appropriate action" by the shareholder encompasses the possibility of filing with the Commission detailed legal arguments in favor of requiring the company to include the proposal, similar to the one which the Medical Committee filed with the Commission in the present case after the Division of Corporation Finance had made its recommendation, and which the Commission accepted without comment or objection. (App. 26a–32a; *see also id.* at 38a–39a.) Finally, the history of the rule explicitly states that it "places the burden of proof upon

the management to show that a particular security holder's proposal is not a proper one for inclusion in management's proxy material." (19 Fed. Reg. 246 (1954).)

We think that these provisions contain persuasive indicia that the Commission's proxy procedures are possessed of sufficient "adversariness" and "formality" to render its final proxy determinations amenable to judicial review, although the scope and content of that review must yet be investigated. This conclusion is inferentially supported by cases dealing with private actions to enforce the proxy rules, in which shareholders have been required to exhaust the administrative remedies provided by the foregoing sections. *Peck v. Greyhound Corp.*, 97 F.Supp. 679 (S.D.N.Y. 1951); *cf. Dyer v. SEC*, 291 F.2d 774, 778 (8th Cir. 1961). However, the Commission urges that the structure of section 14 of the Act gives rise to a doctrinal anomaly if administrative decisions like the present one are held reviewable. This difficulty arises from the fact that even when the Commission moves against recalcitrant management under section 14 of the Act to terminate or prevent violations of the proxy rules, there is never a traditional trial-type hearing followed by a conventional mandatory order. Professor Loss has catalogued the Commission's enforcement alternatives under section 14 as follows:

> [W]hen management or a security holder is adamant in refusing to comply with the rules as the Commission construes them, there is no administrative procedure comparable to the stop-order proceeding under the 1933 act. The Commission may investigate. It may use its statutory power to "publish information concerning * * * violations," as it did in two early instances. It may institute appropriate administrative proceedings of a disciplinary nature under the 1934 act when the offender happens to be a registered broker-dealer or an exchange member, as it may when some other statutory provision or Commission rule has been violated. It may even use a violation of section 14(a) as a basis for delisting the security. And it may ask the Attorney General to prosecute willful violations. But the principal sanction—and the only practicable way of forcing compliance—is the statutory action for injunction.

Loss, *The SEC Proxy Rules in the Courts*, 73 HARV.L.REV. 1041, 1043–44 (1960); *see also* Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U. L.Rev. 875, 886, 886–87 n.50 (1956).

We see little force in this anomaly—if, indeed, it is in fact an anomaly. Through section 14 of the Act Congress has invested the Securities and Exchange Commission with sweeping authority to regulate the solicitation of corporate proxies; the few words employed by Congress in subsection (a) of this provision confer upon the Commission much power, but little guidance or limitation:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce * * * or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy * * * in respect of any security (other than an exempted security) registered pursuant to * * * this title.

(15 U.S.C. § 78n(a) (1964).) Pursuant to this broad mandate, the Commission has established elaborate procedures which are of unquestioned validity for present purposes and which, as we have indicated above, otherwise possess sufficient attributes of finality and formality to warrant judicial review. Viewing the proxy rules in this light, we see no substantial reason why the absence of formal adjudicatory hearings in the regulatory scheme should render Commission decisions, however capricious or erroneous, utterly immune to direct judicial review or redress. Indeed, it seems doubtful that there is any meaningful distinction between review in this situation and review in the commonly accepted context of judicial assessment of final agency determinations made well in advance of, or in collateral proceedings relating to, a statutorily prescribed trial-type hearing. *See, e.g. Phillips Petroleum Co. v. FPC*, *supra*, 227 F.2d at 475; *Isbrandtsen Co. v. United States*, *supra*, 93 U.S.App.D.C. at 297, 211 F.2d at 55.

On the other hand, we do see significant problems and anomalies which would result from accepting the Commission's

restrictive interpretation of the jurisdictional statute. There is no doubt that the Medical Committee could obtain a judicial determination of the legitimacy of its claim through a private action against Dow Chemical in the district court; the Supreme Court held that such a remedy is implicit in section 14(a) in *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). The essential question, then, is whether the district court is a more appropriate forum for adjudication of petitioner's claim than this court. We believe that every substantial consideration in this case leads to precisely the opposite conclusion.

Here the Medical Committee does not seek to contest any matters of fact which would require a trial de novo; rather, petitioner seeks only to have its proposal assessed by the Commission under a proper interpretation of the governing statutes and rules. The petitioner does not seek any relief which is peculiarly within the competence of the district court; instead, it seeks merely to have the cause remanded so that the Commission, in accord with proper standards, can make an enlightened determination of whether enforcement action would be appropriate. Thus we see no practical or theoretical virtues in commanding a course of action which "would result in equal inconvenience" to the petitioner, the Commission, and the overcrowded courts, and "would constitute circuitous routes for the determination of issues easily and directly determinable by review in this court." *American Sumatra Tobacco Corp. v. SEC*, 68 App. D.C. 77, 82, 93 F.2d 236, 241 (1937). *See also Gardner v. Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 191–93 (1967) (Justice Fortas concurring and dissenting); *Environmental Defense Fund, Inc. v. Hardin, supra*, (slip op. at 9); L.JAFFE 358.

There is also, it seems to us, an independent public interest in having the controversy decided in its present posture rather than in the context of a private action against the company. The primary and explicit purpose of section 14(a) is "the protection of investors," and the primary method of implementing this goal is through Commission regulation of proxy statements, not through private actions of individual security holders. For the small investor, personal recourse to the Commission's proxy procedures without benefit of counsel may well be the only practicable method of contesting a management decision to

exclude his proxy proposal.[12] In this situation, as our recent decisions make clear, it is particularly important that the Commission look carefully at the merits of the shareholder's proposal, and that it do so pursuant to an accurate perception of the Congressional intent underlying the proxy statute. *See generally Hale v. FCC*, No. 22,751 (D.C. Cir. Feb. 16, 1970) (slip op. at 15–17; concurring opinion); *Office of Communication of the United Church of Christ v. FCC*, No. 19,409 (D.C. Cir. June 20, 1969). Direct judicial review of Commission proxy decisions is unquestionably the most logical and efficient means of achieving this objective.

Thus, we hold that the Commission's decision in this case is presently reviewable, and turn our attention to an investigation of the proper scope of this review.

C. SCOPE OF REVIEW AND ADMINISTRATIVE DISCRETION

Many of the Commission's most forceful arguments are addressed to the proposition that the action which the Medical Committee now asks us to review falls within the purview of administrative discretion and therefore is protected from judicial inquiry or interference by section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (Supp. V. 1965–69). In large measure, this line of defense reflects the misconstruction of section 10 that Professor Davis has called an "all or none fallacy" which ignores the language and intent of this provision.[13] The more accurate interpretation of the statute holds

[12] This contention was recently presented to the Commmission in a proxy contest involving the General Motors Corporation. *See* CONG. REC. E–2147 (daily ed., March 17, 1970):

> It must be recognized that Management's proxy statement is the only effective vehicle through which all of the shareholders can have an opportunity to express themselves, and even to hear any arguments on the questions involved. * * * [T]he cost [of conducting a competing solicitation] is virtually prohibitive except to extremely well heeled shareholders * * *. This is no ordinary dispute with Management; it is not an effort by insurgent shareholders to seize control of the corporation. If it were so, one could justify large expenditures because the individual rewards are great and because, if successful, the insurgents could obtain reimbursement of their expenses from the company. The issues here lack that personal pecuniary bias. Denial of access to the shareholders through management's proxy solicitation, practically speaking, is total denial.

[13] 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 33 (1958). We note that Professor Davis espouses a more restrictive role for the courts in reviewing the discretionary acts of administrative agencies than that which is urged by other scholarly commentators. *See, e.g.*, Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969), and authorities cited *id.* at 966 n.9.

that assertions of discretion inevitably raise questions of degree which must be appraised in the context of the relevant provisions of law and the nature of the particular action sought to be reviewed: "[T]he question is not *whether* agency action is by law committed to agency discretion but *to what extent* agency action is so committed." 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 33 (1958) (emphasis added); *see also Scanwell Laboratories, Inc. v. Thomas*, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 28–29). Our decisions also make clear that in analyzing issues of administrative discretion, as in dealing with general questions of reviewability, we must be fully cognizant of the strong presumption in favor of judicial review. *Environmental Defense Fund, Inc. v. Hardin*, No. 23,813 (D.C. Cir. May 28, 1970) (slip op. at 7–8).

The Commission asserts that its enforcement activities pursuant to the proxy rules are entitled to particular deference because they partake of the nature of the prosecutorial function, which has traditionally been considered immune to judicial review.[14] This contention is meritorious, as will be seen below, but only in a limited sense; and the decisions of this court have never allowed the phrase "prosecutorial discretion" to be treated as a magical incantation which automatically provides a shield for arbitrariness. Indeed, we have explicitly alluded to the prosecutorial function in compelling an administrative agency to deal openly and fairly with public interest intervenors in licensing proceedings:

> [A] "Public Intervenor" * * * is, in this context, more nearly like a complaining witness who presents evidence to the police or a prosecutor whose duty it is to conduct

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[14] *But cf.* K. DAVIS, DISCRETIONARY JUSTICE 225–26, 229 (1969):

> In the regulatory agencies, abuse of the power to prosecute or not to prosecute may be ten times as frequent as abuse of the power of formal adjudication and therefore may be ten times as damaging to justice. * * *
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> The prosecuting power everywhere, whether exercised by police, by prosecutors, by regulatory agencies, or by other administrators, can and should be highly structured by both rules and precedents. * * *
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> The American assumption that prosecutors' discretion should not be judicially reviewable developed when executive functions were generally unreviewable. The assumption is in need of reexamination in light of the twentieth-century discovery that courts can review executive action to protect against abuses while at the same time avoiding judicial assumption of the executive power.

> an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.
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> * * * It was not the correct role of the Examiner or the Commission to sit back and simply provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.

Office of Communication of the United Church of Christ v. FCC, No. 19,409 (D.C. Cir. June 20, 1969) (slip op. at 6).

There is some reason to believe that similar judicial supervision of the administrative process is needed in circumstances like the present one, in order to assure that the investing public can obtain vigorous, efficient, and evenhanded implementation of the concepts of corporate democracy embodied in the proxy rules. One published study has accused the Commission of a variety of procedural sins in its regulation of proxies, most of which could be curtailed or eliminated through judicial review. Specifically, the Commission has been charged with repeatedly violating its own established procedural principles, particularly those relating to management's burden of proof in justifying the omission of proposals; of allowing non-lawyers to decide complex legal problems raised in proxy disputes; and of affording inconsistent treatment to similar factual situations for no apparent reason.[15] Perhaps the most serious charge against the Commission's secretive decision-making, however, is all too clearly illustrated by the record in the present case: the lack of articulated bases for past decisions encourages management to file shotgun objections to a shareholder proposal, urging every mildly plausible legal argument that inventive counsel can contrive, in the hope that the Commission will accept one of them.[16] If the Commission does agree with one of management's arguments, or if it determines not to act against the company for other reasons, the shareholder often has no idea why his proposal was deemed unworthy or what he can do to cure its defects for subsequent proxy solicitations. Viewed in this light, "discretion" can be merely another manifestation of the venerable bureaucratic technique of exclusion

[15] Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 N.D. LAWYER 13 (1964).

[16] *See id.* at 43.

by attrition, of disposing of controversies through calculated non-decisions that will eventually cause eager supplicants to give up in frustration and stop "bothering" the agency.

Nevertheless, we recognize that there is a legitimate domain of administrative discretion in the proxy area, albeit not quite so broad as the Commission urges. As the Supreme Court has recognized, the Securities and Exchange Commission must process a formidable number of proxy statements in limited time and with insufficient manpower.[17] Obviously not all proxy proposals can or should be given detailed consideration by the full Commission, and even the boldest advocates of judicial review recognize that the agencies' internal management decisions and allocations of priorities are not a proper subject of inquiry by the courts.[18] However, that is definitely not what is at issue in the present case: here, the full Commission has exercised its discretion to review this controversy, and, as will be seen below, it has ostensibly acted in accord with a very dubious legal theory. The Medical Committee asks us merely to examine this allegedly erroneous legal premise and return the controversy to the Commission so that it may properly exercise its further discretion regarding the propriety and desirability of enforcement activity.[19]

Limited and partial review to examine the legal framework within which administrative discretion must be exercised is scarcely a doctrinal innovation; it has been repeatedly sus-

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[17] *Cf.* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964):

> The Commission advises that it examines over 2,000 proxy statements annually and each of them must necessarily be expedited. Time does not permit an independent examination of the facts set out in the proxy material and this results in the Commission's acceptance of the representations contained therein at their face value, unless contrary to other material on file with it.

[18] *Cf.* Environmental Defense Fund, Inc. v. Hardin, *supra*, slip. op. at 10; Goldman, *Administrative Delay and Judicial Relief*, 66 MICH.L.REV. 1423, 1426–31 (1968).

[19] Were we to compel the Commission either to entertain adminintrative review of a staff decision in the first instance, or to undertake particular enforcement activity upon remand, our decision might well conflict with the precedents which the Commission has cited involving petitioners' attempts to have courts order the Commission to initiate investigation pursuant to different sections of the Act. *See* Dyer v. SEC, 291 F.2d 774 (8th Cir. 1961); Leighton v. SEC, 95 U.S.App.D.C. 217, 221 F.2d 91, *cert. denied*, 350 U.S. 825 (1955) We note, however, that other circuits in dealing with action by other agencies have occasionally circumscribed administrative discretion to undertake investigatory activities. *See, e.g.*, Trailways of New England, Inc. v. CAB, 412 F.2d 926, 931–33 (1st Cir. 1969).

tained by the Supreme Court. *See, e.g., McGrath v. Kristensen*, 340 U.S. 162, 169 (1950); *Perkins v. Elg*, 307 U.S. 325, 349–50 (1939). We think that Justice Frankfurter's incisive observations in *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 136 (1939), are equally appropriate here:

> Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles.

We foresee scant possibility that such sharply circumscribed review, which depends upon the Commission's initial determination to review the staff decision, will cause the destruction of informal advisory and supervisory functions which the Commission now fears. The courts, we think, are abundantly capable of distinguishing between situations in which an agency gives informal advice and situations in which it formally decides among conflicting adversary claims premised on detailed legal arguments. Moreover, experience indicates that the grim forebodings which are frequently expressed in this court regarding the possibility that a particular decision will cause irreparable disruption of the administrative process only rarely, if ever, come to pass.[20]

On the other hand, if we were to foreclose review as the Commission urges, we would surely be condoning a frustration of congressional intent; for here the petitioner asserts that the Commission is failing to correct abuses which Congress sought to end by enacting the statute, and that it is a member of the class which Congress endeavored to protect in the Securities Act. In such situations, as a leading commentator has phrased it, "[i]nterests intended as the beneficiaries of legislative munificence will have cold comfort from embracing

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[20] *Cf.* Goodman v. United States, No. 22,521 (D.C. Cir. Jan. 30, 1970) (slip op. at 9): "Words like 'chaos' and 'impossible situation' fall readily from bureaucratic lips when confronted with the prospect of doing something not absolutely required by the book." *See also* Scanwell Laboratories, Inc. v. Thomas, No. 22,863 (D.C. Cir. Feb. 13, 1970) (slip op. at 25–26).

the dry, unmoving skeleton of the statute." [21] Review limited to the task of correcting such legal defects is consistent with the Supreme Court's interpretation of the Securities Act in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964): "[A]mong [the] chief purposes [of section 14(a)] is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." Therefore, we conclude that partial review of the merits of this controversy will not project us into an area which is committed by law to agency discretion.

III. The Merits of Petitioner's Proposal

The Medical Committee's sole substantive contention in this petition is that its proposed resolution could not, consistently with the Congressional intent underlying section 14(a), be properly deemed a proposal which is either motivated by *general* political and moral concerns, or related to the conduct of Dow's ordinary business operations. These criteria are two of the established exceptions to the general rule that management must include all properly submitted shareholder proposals in its proxy materials. They are contained in Rule 14a–8(c), 17 C.F.R. § 240.14a–8(c) (1970), which provides in relevant part:

> * * * [M]anagement may omit a proposal * * * from its proxy statement and form of proxy under any of the following circumstances:
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> * * * * *
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> (2) If it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes; or
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> * * * * *
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> (5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer.

Despite the fact that our October 13 order in this case deferred resolution of the jurisdictional issue pending full argu-

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[21] Jaffe, *The Individual Right to Initiate Administrative Process*, 25 Iowa L. Rev. 485 (1940).

ment on the merits (*see* part I, *supra*), the Commission has not designed to address itself to any possible grounds for allowing management to exclude this proposal from its proxy statement. We confess to a similar puzzlement as to how the Commission reached the result which it did, and thus we are forced to remand the controversy for a more illuminating consideration and decision. *Cf. Environmental Defense Fund, Inc. v. Hardin*, *supra*. In aid of this consideration on remand, we feel constrained to explain our difficulties with the position taken by the company and endorsed by the Commission.

It is obvious to the point of banality to restate the proposition that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy. The depth of this commitment is reflected in the strong language employed in the legislative history:

> Even those who in former days managed great corporations were by reason of their personal contacts with their shareholders constantly aware of their responsibilities. But as management became divorced from ownership and came under the control of banking groups, men forgot that they were dealing with the savings of men and the making of profits became an impersonal thing. When men do not know the victims of their aggression they are not always conscious of their wrongs. * * *
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> * * * * * *
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> Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange. Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies.

H.R. REP. No. 1383, 73d Cong., 2d Sess. 5, 13 (1934). *See also SEC v. Transamerica Corp.*, 163 F.2d 511, 517, 518 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948).

In striving to implement this open-ended mandate, the Commission has gradually evolved its present proxy rules. Early exercises of the rule-making power were directed primarily toward the achievement of full and fair corporate disclosure regarding management proxy materials (*see, e.g.*, 3 Fed. Reg. 1991 (1938); 5 Fed. Reg. 174 (1940)); the rationale underlying

this development was the Commission's belief that the corporate practice of circulating proxy materials which failed to make reference to the fact that a shareholder intended to present a proposal at the annual meeting rendered the solicitation inherently misleading. *See Hearings on Security and Exchange Commission Proxy Rules Before the House Comm. on Interstate and Foreign Commerce*, 78th Cong., 1st Sess., pt. 1, at 169–70 (1943) [hereinafter "House Hearings"]. From this position, it was only a short step to a formal rule requiring management to include in its proxy statement any shareholder proposal which was "a proper subject for action by the security holders." 7 Fed. Reg. 10,659 (1942). It eventually became clear that the question of what constituted a "proper subject" for shareholder action was to be resolved by recourse to the law of the state in which the company had been incorporated; however, the paucity of applicable state law giving content to the concept of "proper subject" led the Commission to seek guidance from precedent existing in jurisdictions which had a highly developed commercial and corporate law, and to develop its own "common law" relating to proper subjects for shareholder action. *See generally II L.Loss, Securities Regulation* 905–06 (1961); *Hearings on SEC Enforcement Problems Before a Subcom. of the Senate Comm. on Banking and Currency*, 85th Cong., 1st Sess., pt. 1, at 118 (1957) [hereinafter "Senate Hearings"].

Further areas of difficulty became apparent as experience was gained in administering the "proper subject" test, and these conflicts provided the Commission with opportunities to put a detailed gloss upon the general phraseology of its rules. Thus, in 1945 the Commission issued a release containing an opinion of the Director of the Division of Corporation Finance that was rendered in response to a management request to omit shareholder resolutions which bore little or no relationship to the company's affairs; for example, these shareholder resolutions included proposals "that the anti-trust laws and the enforcement thereof be revised," and "that all Federal legislation hereafter enacted providing for workers and farmers to be represented should be made to apply equally to investors." [22] The Commission's release endorsed the Director's conclusion that "proposals which deal with general political, social or economic matters are not, within the meaning of the rule, 'proper subjects

[22] Securities Exchange Act Release No. 3638 (Jan. 3, 1945), Brief for Petitioner at Addendum p. 2–3.

for action by security holders.' " [23] The reason for this conclusion was summarized as follows in the Director's opinion:

> Speaking generally, *it is the purpose of Rule X–14A–7 to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation;* that is, such matters relating to the affairs of the company concerned as are proper subjects for stockholders' action under the laws of the state under which it was organized. It was not the intent of Rule X–14A–7 to permit stockholders to obtain the consensus of other stockholders with respect to matters which are of a general political, social or economic nature. *Other forums exist for the presentation of such views.*[24]

Several years after the Commission issued this release, it was confronted with the same kind of problem when the management of a national bus company sought to omit a shareholder proposal phrased as "A Recommendation that Management Consider the Advisability of Abolishing the Segregated Seating System in the South"—a proposal which, on its face, was ambiguous with respect to whether it was limited solely to company policy rather than attacking all segregated seating, and which quite likely would have brought the company into violation of state laws then assumed to be valid.[25] The Commission staff approved management's decision to omit the proposal, and the shareholder then sought a temporary injunction against the company's solicitation in a federal district court. The injunction was denied because the plaintiff had failed to exhaust his administrative remedies or to show that he would be irreparably harmed by refusal to grant the requested relief. *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951). The Commission amended its rules the following year to encompass the above-quoted exception for situations in which "it clearly appears that the proposal is submitted by the security holder * * * primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes."

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[23] *Id.* at Addendum p. 2.

[24] *Id.* at Addendum p. 3 (emphasis added).

[25] *See* Emerson & Latcham, *The SEC Proxy Proposal Rule: The Corporate Gadfly*, 19 U.CHI. L.REV. 807, 833 (1952); CONG. REC. E–2149 (daily ed. March 17, 1970).

17 Fed. Reg. 11,433 (1952); *see also id.* at 11,431. So far as we have been able to determine, the Commission's interpretation or application of this rule has not been considered by the courts.

The origins and genesis of the exception for proposals "relating to the conduct of the ordinary business operations of the issuer" are somewhat more obscure. This provision was introduced into the proxy rules in 1954, as part of amendments which were made to clarify the general proposition that the primary source of authority for determining whether a proposal is a proper subject for shareholder action is state law. *See* 19 Fed. Reg. 246 (1954). Shortly after the rule was adopted, the Commission explained its purpose to Congress in the following terms:

> The policy motivating the Commission in adopting the rule * * * is basically the same as the underlying policy of most State corporation laws to confine the solution of ordinary business problems to the board of directors and place such problems beyond the competence and direction of the shareholders. The basic reason for this policy is that it is manifestly impracticable in most cases for stockholders to decide management problems at corporate meetings.
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> * * * * *
>
> * * * While rule X–14A–8 does not require that the ordinary business operations be determined on the basis of State law, the premise of Rule X–14A–8 is that the propriety of * * * proposals for inclusion in the proxy statement is to be determined in general by the law of the State of incorporation. * * * Consistency with this premise requires that the phrase "ordinary business operations" in rule X—14A–8 have the meaning attributed to it under applicable State law. To hold otherwise would be to introduce into the rule the possibility of endless and narrow interpretations based on no ascertainable standards.

(Senate Hearings at 118.) It also appears that no administrative interpretation of this exception has yet been scrutinized by the courts.

These two exceptions are, on their face, consistent with the legislative purpose underlying section 14; for it seems fair to

infer that Congress desired to make proxy solicitations a vehicle for *corporate* democracy rather than an all-purpose forum for malcontented shareholders to vent their spleen about irrelevant matters,[26] and also realized that management cannot exercise its specialized talents effectively if corporate investors assert the power to dictate the minutiae of daily business decisions. However, it is also apparent that the two exceptions which these rules carve out of the general requirement of inclusion can be construed so as to permit the exclusion of practically any shareholder proposal on the grounds that it is either "too general" or "too specific." Indeed, in the present case Dow Chemical Company attempted to impale the Medical Committee's proposal on both horns of this dilemma: in its memorandum of counsel, it argued that the Medical Committee's proposal was a matter of ordinary business operations properly within the sphere of management expertise and, at the same time, that the proposal clearly had been submitted primarily for the purpose of promoting general political or social causes. (App. 9a–10a; *see also id.* at 19a). As noted above, the Division of Corporation Finance made no attempt to choose between these potentially conflicting arguments, but rather merely accepted Dow Chemical's decision to omit the proposal "[f]or reasons stated in [the company's] letter and the accompany-

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[26] *See, e.g.*, the following colloquy, which appears in House Hearings at 162–63:

> Mr. BOREN. So one man, if he owned one share in A.T. & T. * * * and another share in R.C.A. * * * if he decided deliberately * * * to become a professional stockholder in each one of the companies—he could have a hundred-word propaganda statement prepared and he could put it in every one of these proxy statements. Suppose he were a Communist.
>
> Commissioner PURCELL. That is possible. We have never seen such a case.
>
> Mr. BOREN. Suppose a man were a Communist and he wanted to send to all of the stockholders of all these firms, a philosophic statement of 100 words in length, or a propaganda statement * * *. He could by the mere device of buying one share of stock * * * have available to him the mailing list of all the stockholders in the Radio Corporation of America.
>
> * * * * *
>
> Commissioner PURCELL. Of course, we have never seen such a case; and if such a case came before us, then we would have to deal with it and make such appropriate changes as might seem necessary * * *.

ing opinion of counsel, both dated January 17, 1969;"[27] this determination was then adopted by the full Commission. Close examination of the company's arguments only increases doubt as to the reasoning processes which led the Commission to this result.

In contending that the Medical Committee's proposal was properly excludable under Rule 14a-8(c)(5), Dow's counsel asserted:

> It is my opinion that *the determination of the products which the company shall manufacture*, the customers to which it shall sell the products, and the conditions under which it shall make such sales are related to the conduct of the ordinary business operations of the Company and that any attempt to amend the Certificate of Incorporation to define the circumstances under which the management of the Company shall make such determinations is contrary to the concept of corporate management, which is inherent in the Delaware General Corporation Act under which the Company is organized.[28]

In the first place, it seems extremely dubious that this superficial analysis complies with the Commission's longstanding requirements that management must sustain the burden of proof when asserting that a shareholder proposal may properly be omitted from the proxy statement, and that "[w]here man-

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[27] App. 20a. The letter referred to by the Division merely contains a citation to the proxy rules and a reference to the opinion of counsel (see App. 12a); thus, for present purposes the only relevant argument is that contained in the memorandum of counsel.

[28] App. 9a (emphasis added). The remainder of the company's argument under Rule 14a-8(c)(5) reads as follows, in its entirety:

> Moreover, there is considerable doubt as to the efficacy of the proposed limitation in the context of the ability of the Government of the United States to issue a directive that the Company manufacture napalm. Therefore, the proposed limitation could conceivably be contrary to the requirements of the Defense Production Act of 1950.

(App. 9a-10a.) In response to this contention, the Medical Committee pointed out that "any such amendment would, of course, be subject to the requirements of the 'Defense Production Act of 1950,' as are the corporate charters and management decisions of all United States Corporations." (App. 16a.) No rebuttal by Dow was forthcoming.

agement contends that a proposal may be omitted because it is not proper under State law, it will be incumbent upon management to refer to the applicable statute or case law." 19 Fed. Reg. 246 (1954). As noted above, the Commission has formally represented to Congress that Rule 14a-8(c)(5) is intended to make state law the governing authority in determining what matters are ordinary business operations immune from shareholder control; yet, the Delaware General Corporation law provides that a company's Certificate of Incorporation may be amended to "change, substitute, enlarge or diminish the nature of [the company's] business." [29] If there are valid reasons why the Medical Committee's proposal does not fit within the language and spirit of this provision, they certainly do not appear in the record.

The possibility that the Medical Committee's proposal could properly be omitted under Rule 14a–8(c)(2) appears somewhat more substantial in the circumstances of the instant case, although once again it may fairly be asked how Dow Chemical's arguments on this point could be deemed a rational basis for such a result: the paragraph in the company's memorandum of counsel purporting to deal with this issue, which is set forth in the margin,[30] consists entirely of a fundamentally irrelevant recitation of some of the political protests which had been directed at the company because of its manufacture of napalm, followed by the abrupt conclusion that management is therefore

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[29] Chapter 1, Title 8 Delaware Code §§ 242(a)(2), 242(d) (1968). *Cf.* II L.Loss, Securities Regulation 906 (1961): "Inevitably the Commission, while purporting to find and apply a generally nonexistent state law, has been building up a 'common law' of its own as to what constitutes a 'proper subject' for shareholder action. It is a 'common law' which undoubtedly would yield, as it should, to a contrary decision of the particular state court."

[30] App. 10a:

> It is a well-known fact that the Company has been the target of protests and demonstrations for the past few years at its office and plant locations, and on the occasion of recruiting on college and university campuses, as well as at its annual meeting of stockholders held May 8, 1968. The various protests and demonstrations are a reflection of opposition on the part of certain segments of the population against the policy of the United States Government in waging the war in Viet Nam. Although The Dow Chemical Company was not among the 100 largest prime contractors with the Department of Defense during the 1967–68 Government fiscal year and was only 75th on the list in the 1966–67 fiscal year, it appears to have been singled out symbolically by the protesters. Under all of these circumstances it is my opinion that it clearly appears that the proposal is primarily for the purpose of promoting a general political, social or similar cause.

entitled to exclude the Medical Committee's proposal from its proxy statement. Our own examination of the issue raises substantial questions as to whether an interpretation of Rule 14a–8 (c)(2) which permitted omission of this proposal as one motivated primarily by *general* political or social concerns would conflict with the congressional intent underlying section 14(a) of the Act.

As our earlier discussion indicates, the clear import of the language, legislative history, and record of administration of section 14(a) is that its overriding purpose is to assure to corporate shareholders the ability to exercise their right—some would say their duty[31]—to control the important decisions which affect them in their capacity as stockholders and owners of the corporation. Thus, the Third Circuit has cogently summarized the philosophy of section 14(a) in the statement that "[a] corporation is run for the benefit of its stockholders and not for that of its managers." *SEC v. Transamerica Corp.*, 163 F.2d 511, 517 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948). Here, in contrast to the situations detailed above which led to the promulgation of Rule 14a–8(c)(2), the proposal relates solely to a matter that is completely within the accepted sphere of corporate activity and control. No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy. Thus, even accepting Dow's characterization of the purpose and intent of the Medical Committee's proposal, there is a strong argument that permitting the company to exclude it would contravene the purpose of section 14(a).

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[31] *See* Bayne, *The Basic Rationale of Proper Subject*, 34 U.DET.L.J. 575, 579 (1957):

> In so far as the shareholder has contributed an asset of value to the corporate venture, in so far as he has handed over his goods and property and money for use and increase, he has not only the clear right, but more to the point, perhaps, he has the stringent duty to exercise control over that asset for which he must keep care, guard, guide, and in general be held seriously responsible.
>
> * * * As much as one may surrender the immediate disposition of [his] goods, he can never shirk a supervisory and secondary duty (not just a right) to make these goods are used justly, morally and beneficially.

However, the record in this case contains indications that we are confronted with quite a different situation. The management of Dow Chemical Company is repeatedly quoted in sources which include the company's own publications as proclaiming that the decision to continue manufacturing and marketing napalm was made not *because* of business considerations, but *in spite of* them; that management in essence decided to pursue a course of activity which generated little profit for the shareholders and actively impaired the company's public relations and recruitment activities because management considered this action morally and politically desirable. (App. 40a–43a; *see also id.* at 33.) The proper political and social role of modern corporations is, of course, a matter of philosophical argument extending far beyond the scope of our present concern; the substantive wisdom or propriety of particular corporate political decisions is also completely irrelevant to the resolution of the present controversy. What *is* of immediate concern, however, is the question of whether the corporate proxy rules can be employed as a shield to isolate such managerial decisions from shareholder control.[32] After all, it must be remembered that "[t]he control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a)." *SEC v. Transamerica Corp., supra,* 163 F.2d at 518. We think that there is a clear and compelling distinction between management's legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management's patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections. It could scarcely be argued that management is more qualified or more entitled to make these kinds of decisions than the shareholders who are the true beneficial owners of the corporation; and it seems equally implausible that an application of the proxy rules which permitted such a result could be harmonized with the philosophy of corporate democracy which Congress embodied in section 14(a) of the Securities Exchange Act of 1934.

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[32] *Cf.* Note, *Coporate Political Affairs Programs,* 70 YALE L.J. 821, 846–47 (1961).

In light of these considerations, therefore, the cause must be remanded to the Commission so that it may reconsider petitioner's claim within the proper limits of its discretionary authority as set forth above, and so that "the basis for [its] decision [may] appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review." [33]

Remanded for further proceedings consistent with this opinion.

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.
By: Dorothy E. Long, Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1969.

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT.

PETITION FOR REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION.

Before: McGowan, Tamm and Robinson, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Securities & Exchange Commission and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that this case is hereby remanded to the

[33] Environmental Defense Fund, Inc. v. Hardin, No. 28,813 (D.C. Cir. May 28, 1970) (slip op. at 11).

Securities and Exchange Commission for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

NATHAN J. PAULSON,
Clerk.

Dated: July 8, 1970.
Opinion per Circuit Judge Tamm.

A true copy:

Test: NATHAN J. PAULSON, Clerk
United States Court of Appeals
for the District of Columbia Circuit.

By: Dorothy E. Long, Deputy Clerk

United States Court of Appeals for the District of Columbia Circuit

Washington, D.C. 20001, August 25, 1970.

No. 23105—MEDICAL COMMITTEE FOR HUMAN RIGHTS, v. SECURITIES AND EXCHANGE COMMISSION

DAVID FERBER, ESQUIRE,
500 North Capitol Street, Washington, D.C. 20549

DEAR MR. FERBER: Enclosed is a copy of the Court's order denying your petition for rehearing. You are further informed that your suggestion for rehearing *en banc* was transmitted to the full Court, and no Judge has requested a vote thereon.

In view of the foregoing, it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

NATHAN J. PAULSON, *Clerk.*

NJP/erh
Enclosure
cc: Richard B. Herzog, Esquire.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1969

No. 23105

MEDICAL COMMITTEE FOR HUMAN RIGHTS, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

Before: McGOWAN, TAMM and ROBINSON, Circuit Judges, in Chambers

ORDER

On consideration of respondent's petition for rehearing,

Ordered by the Court that respondent's aforesaid petition is denied.

Per Curiam

For the Court:
NATHAN J. PAULSON,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1162

SECURITIES AND EXCHANGE COMMISSION, PETITIONER,

v.

MEDICAL COMMITTEE FOR HUMAN RIGHTS

Order Allowing Certiorari. Filed March 22, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

U.S. GOVERNMENT PRINTING OFFICE: 1971